85-1172

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM G. MITCHELL,

Petitioner,

v.

PEPSI COLA BOTTLERS, INC.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JULIUS V. PADEGIMAS
(Counsel of Record for Petitioner,
William G. Mitchell)
100 West Monroe Street
Chicago, Illinois 60603
(312) 726-0756

Pandick Midwest, Inc., Chicago • (312) 733-6000

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UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

October 8, 1985

No. 84-2949

BEFORE

HON. RICHARD D. CUDAHY, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. WILBUR F. PELL, JR., Senior Circuit Judge

WILLIAM G. MITCHELL, *Plaintiff-Appellant,* *vs.* PEPSI-COLA BOTTLERS, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, a/k/a AUTOMOBILE MECHANICS UNION, #701	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 84 C 5054 John F. Grady, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant, William G. Mitchell, no judge in regular active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2949

WILLIAM G. MITCHELL,

Plaintiff-Appellant,

v.

PEPSI-COLA BOTTLERS, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, a/k/a AUTOMOBILE MECHANICS UNION, #701,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 84 C 5054—John F. Grady, *Judge.*

ARGUED APRIL 18, 1985—DECIDED SEPTEMBER 3, 1985

Before CUDAHY and POSNER, *Circuit Judges*, and PELL, *Senior Circuit Judge.*

PELL, *Senior Circuit Judge.* Plaintiff-appellant Mitchell filed a two-count complaint against defendant-appellee Pepsi-Cola Bottlers, Inc. (Pepsi-Cola or Pepsi) in Illinois state court on May 11, 1984, alleging that Pepsi, by its agents, tortiously had procured Mitchell's resignation from employment and had defamed Mitchell. Mitchell amended his complaint on May 18, 1984, to include a third count joining as a defendant Automobile Mechanics Local #701 (the Union). Count III alleged that the Union and Pepsi-Cola had conspired to deprive Mitchell of whatever rights he possessed under a collective bargaining agreement negotiated by the Union and Pepsi-Cola. The Union

and Pepsi-Cola thereafter jointly filed, in the United States District Court for the Northern District of Illinois, a petition to remove Mitchell's causes of action to federal court, on the ground that Mitchell's claims arose under section 301 of the Labor Management Relations Act. 29 U.S.C. § 185 (1978). Four days later, Mitchell voluntarily dismissed Count III of his amended complaint, leaving Pepsi-Cola as the sole defendant in the action. Mitchell then filed a motion to remand Counts I and II to Illinois state court. In a memorandum opinion dated October 26, 1984, the district court denied Mitchell's motion to remand, granted summary judgment for Pepsi-Cola on Count I, and dismissed Count II. Mitchell appeals from the district court's action.

I. THE FACTS

Plaintiff Mitchell worked for defendant Pepsi-Cola as a mechanic until May 18, 1982. During his employment, plaintiff was a member of Automobile Mechanics Union #701, and was a beneficiary of a collective bargaining agreement negotiated by the Union and Pepsi-Cola. The collective bargaining agreement prohibited termination of employees without just cause and established a grievance and arbitration procedure for the settlement of employee grievances.

At some point prior to May 18, 1982, Pepsi-Cola transferred Mitchell from its Elk Grove, Illinois, facility to a facility located in Gurnee, Illinois. Mitchell maintains that defendant Pepsi-Cola's agents instructed him at that time to bring certain of defendant's tools to the Gurnee plant. Later, Pepsi-Cola accused Mitchell of stealing the tools. This dispute led to Mitchell's involuntary resignation.

Mitchell contends that Pepsi's conduct in procuring his resignation was fraudulent and coercive, amounting to a tort under Illinois law. Mitchell maintains that Pepsi's agents threatened that Mitchell would never work again

unless Mitchell resigned from employment at Pepsi and that they threatened to blackball Mitchell if he sought employment at other plants. Mitchell further contends that Pepsi's agents defamed him in their efforts to procure his resignation.

In accordance with the collective bargaining agreement in force between Pepsi and the Union, Mitchell filed a grievance and requested a hearing to determine the validity of his involuntary resignation. The outcome of that hearing was apparently unfavorable to Mitchell. At oral argument, counsel for Mitchell contended that Mitchell failed to seek further review according to contract procedures because his union steward told him it would be useless to proceed further.

Approximately two years later, Mitchell filed suit in state court against Pepsi, challenging the manner of his termination from employment. One week later, Mitchell joined the Union as a defendant in the action, but later voluntarily dismissed his claims against the Union. Following removal of the action to federal court, on the ground that Mitchell's cause of action arose under 29 U.S.C. § 185 (1978), Pepsi successfully sought dismissal of Mitchell's involuntary resignation claim for failure to exhaust contractual remedies. The district court also dismissed Mitchell's defamation claim without prejudice, declining to exercise jurisdiction over the defamation claim after dismissal of the involuntary resignation claim, and observing that the defamation claim was untimely filed according to Illinois law. Mitchell argues that the district court erroneously exercised removal jurisdiction over his tort claims and contends that the court should have remanded the claims to state court.

II. REMOVAL JURISDICTION AND § 301

According to 28 U.S.C. § 1441(b), "any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States [is] removable

without regard to the citizenship of the parties." 28 U.S.C. § 1441(b) (1973). In other words, a defendant may remove a cause of action presenting a federal question to federal court without regard to diversity of citizenship. In addition, subsection (c) of 28 U.S.C. § 1441 makes clear that a defendant may remove an entire case to federal court whenever a removable claim is joined with one or more otherwise non-removable claims. 28 U.S.C. § 1441(c) (1973).

In this case, defendant Pepsi removed plaintiff's case to federal court on the ground that plaintiff's cause of action for tortious termination of employment arose under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1978). Section 301 confers original jurisdiction on the district courts over suits for violation of collective bargaining agreements negotiated by labor organizations and employers in industries affecting commerce. 29 U.S.C. § 185 (1978). Defendant Pepsi contended that plaintiff's involuntary resignation claim alleged a violation of the collective bargaining agreement in force between Pepsi and the Union, even though plaintiff's complaint did not present explicitly such a theory of recovery. Plaintiff's complaint did allege, however, that plaintiff was a member of the Union at the time Pepsi forced him to resign from employment and that plaintiff possessed rights under a collective bargaining agreement negotiated between defendant and the Union. Plaintiff's short-lived amended complaint alleged that the Union and Pepsi had conspired to deny plaintiff such rights.

After reviewing these allegations in plaintiff's complaint, the district court concluded that the complaint stated a cause of action for violation of a collective bargaining agreement under section 301. We agree. We acknowledge, of course, that whether a complaint presents such a federal question ordinarily depends on the theory of recovery advanced in a plaintiff's well-pleaded complaint. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-12 (1983). We acknowledge, in addition, that a complaint does not present a federal

question merely because it anticipates or elicits a federal defense. *Id.* at 10. A plaintiff may not avoid federal question jurisdiction, however, by artfully omitting to plead federal questions essential to his or her right of recovery. *Id.* at 22.

The district court correctly stated and applied this well-pleaded complaint rule as well as its artful pleading exception in construing the allegations of plaintiff's complaint. The district court found, and we agree, that the gist of plaintiff's complaint was a claim for relief due to Pepsi's allegedly tortious behavior in accusing plaintiff of stealing tools and in procuring his resignation from employment. We concur with the district court that defendant and the Union intended their collective bargaining agreement to govern such disputes. Indeed, the agreement contained provisions relating to discharge for theft, defendant's responsibility to furnish mechanics such as plaintiff with tools, and a grievance and arbitration procedure for "all difficulties and misunderstandings" arising out of the application of the collective bargaining agreement. Thus, plaintiff's complaint presented a type of dispute which defendant and the Union had anticipated and for which they had provided an administrative resolution procedure. This dispute therefore implicated a collective bargaining agreement, concededly in an industry affecting commerce, and fell within the original jurisdiction conferred on the district courts by section 301. 29 U.S.C. § 185 (1978). *See Allis-Chalmers Corp. v. Lueck*, ___ U.S. ___, 105 S. Ct. 1904, 1916 (1985). As a result, it presented a federal question and removal to federal court was proper.

III. PREEMPTION AND § 301

Our conclusion that plaintiff's complaint presented a federal question is bolstered by the many cases holding that federal law preempts state law in cases arising under section 301. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 105 S.

Ct. at 1910-12; *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. at 23, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). *See also*, Note, *Federal Preemption, Removal Jurisdiction and the Well-Pleaded Complaint*, 51 U. CHI. L. REV. 634, 665 (1984). Although state courts retain concurrent jurisdiction over cases arising under section 301, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506 (1962), state courts adjudicating such cases must apply federal law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. at 456. The federal law governing these section 301 cases includes a federal policy favoring arbitration of labor-management disputes, *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 567-68 (1960) *(Steelworkers I); United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) *(Steelworkers II)*, and a federal interest in uniformity of result, *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). The federal policy favoring private arbitration of labor disputes has induced courts to establish a requirement that employees suing under section 301 first exhaust their administrative remedies. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965); *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1488 (7th Cir. 1985); *Huffman v. Westinghouse Electric Corp.*, 752 F.2d 1221, 1223 (7th Cir. 1985). The federal interest in uniformity of result under section 301 has produced a multitude of cases foreclosing suits based on state common law when the disputes underlying those suits turn on the terms of an agreement between parties to a labor contract. *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. at 1916; *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468, 1473-74 (9th Cir. 1984); *Moore v. General Motors Corp.*, 739 F.2d 311, 317 (8th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 2320 (1985).

In *Allis-Chalmers*, for example, the Supreme Court held that section 301 preempted a state law claim based on alleged bad faith in the handling of an employee's disability claim because the claim required interpretation of a collective bargaining agreement. *Id.*, 105 S. Ct. at 1916. The Eighth Circuit reached an analogous result in *Moore v.*

General Motors Corp., 739 F.2d at 316, where the court found that section 301 preempted a state law claim alleging negligence and fraud in the transfer of employees to a new plant because any transfer rights possessed by employees derived from a collective bargaining agreement.

Several decisions from the Ninth Circuit employ similar analysis in dismissing state law claims. *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d at 1474-76 (9th Cir. 1984); *Buscemi v. McDonnell Douglas Corp.*, 736 F.2d 1348, 1351 (9th Cir. 1984). *Cf. Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1368 (9th Cir. 1978) (decided under the Railway Labor Act), *cert. denied*, 439 U.S. 930. In *Olguin*, for example, the Ninth Circuit dismissed state law claims for wrongful discharge and infliction of emotional distress because the court found that the claims concerned the terms and conditions of plaintiff's employment as set forth in a collective bargaining agreement. *Id.*, 740 F.2d at 1474-76.

Nevertheless, federal law does not preempt all state law claims concerning employment or all claims involving a provision of a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. at 1911. To the contrary, the Supreme Court has recognized several varieties of state law claims that fall outside the preemptive sweep of federal labor law. *See Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (employer misrepresentations to replacement workers); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) (union trespassing); *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977) (outrageous union conduct resulting in employee emotional distress); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966) (malicious defamation); *International Union, United Automobile Workers v. Russell*, 356 U.S. 634 (1958) (mass picketing accompanied by threats of violence). In permitting these state law claims, the Supreme Court has often emphasized that the claims threatened no interference with the operation of federal labor law and that the claims involved issues unrelated to the central concerns of federal

labor statutes. In *Sears, Roebuck*, for example, the Supreme Court emphasized that a state trespass action would focus on the location of challenged union picketing, unlike an unfair labor practice proceeding, which would focus on the object of the union's picketing. *Id.*, 436 U.S. at 198.

Plaintiff contends that his involuntary discharge claim falls within these exceptions to the general preemption rule because his claim focuses on the abusive manner in which Pepsi procured his resignation rather than on the question whether his forced resignation was supported by just cause. Moreover, plaintiff asserts that his involuntary resignation claim cannot implicate the collective bargaining agreement between Pepsi and the Union because defendant did not discharge plaintiff, but sought to avoid the provisions of the collective bargaining agreement by forcing plaintiff to resign involuntarily. We believe plaintiff interprets too narrowly the protections afforded by the just cause provisions, among others, of the collective bargaining agreement. Plaintiff's involuntary resignation claim appears to state a claim for constructive discharge and to seek relief on the ground that his constructive discharge was wrongful. In addition, the lost wages and other damages which plaintiff alleges as a result of his constructive discharge appear to be an incident of the discharge itself and not an incident of independent tortious activity by Pepsi. *See Magnuson v. Burlington Northern, Inc.*, 576 F.2d at 1369. The constructive discharge, therefore, presented issues covered by the collective bargaining agreement between Pepsi and the Union —issues which could have been resolved by grievance and arbitration. Plaintiff's involuntary resignation dispute, unlike the disputes presented to the Supreme Court in cases such as *Sears, Roebuck* and *Farmer*, involved issues central to the concerns reflected by section 301 and the cases decided thereunder.

We note, additionally, that many disputes involving involuntary resignations rather than standard discharges have been resolved by grievance and arbitration in accord

with contract procedures. *See, e.g., Ralph's Grocery Co. v. Retail Clerk's Union, Local 770*, 77 Lab. Arb. (BNA) 867, 870-71 (1981) (Kaufman, Arb.); *General Battery Corp. v. United Automobile Workers, Local 1049*, 74 Lab. Arb. (BNA) 505, 506 (1980) (Craig, Arb.); *Skaggs Supercenters, Inc. v. Retail Store Employees Union, Local 782*, 73 Lab. Arb, (BNA) 544, 546 (1979) (Cohen, Arb.). These arbitration cases correctly characterize involuntary resignations as constructive discharges fully subject to administrative dispute resolution. *Ralph's Grocery Co.*, 77 Lab. Arb. (BNA) at 870-71. We agree with that analysis and remark that a contract's prohibition against discharge without just cause would be nugatory if an employer could avoid its effect simply by forcing employees to quit before taking action to fire them.

IV. THE EXHAUSTION DEFENSE

Because plaintiff's constructive discharge claim presented issues which substantially depended upon the terms of the collective bargaining agreement between defendant and the Union, the claim arose under section 301, *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. at 1916, and required reference to federal substantive law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. at 456. That law, as we previously noted, includes a strong preference for private arbitration as a method to resolve labor disputes. *Allis-Chalmers*, 105 S. Ct. at 1915; *Steelworkers II*, 363 U.S. at 582. As the Supreme Court observed in *Steelworkers II*:

> ... [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle

by which meaning and content are given to the collective bargaining agreement.

Id. at 581.

The federal law governing section 301 claims also includes, as we have noted, a general requirement that employees must attempt to exhaust grievance and arbitration procedures before bringing suit in federal or state court. *Republic Steel Corp. v. Maddox*, 379 U.S. at 652; *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1214 (9th Cir. 1980) (per curiam). In the case before us, plaintiff initiated grievance and arbitration proceedings but declined to pursue the full range of administrative review available under the collective bargaining agreement, apparently because his union steward told him it would be useless to proceed further. Plaintiff does not allege, however, that his union representatives committed a breach of their duty fairly to represent him in processing his grievance. Plaintiff therefore cannot protest that requiring him to exhaust administrative remedies under the collective bargaining agreement would result in unfairness because his union representatives subverted the grievance and arbitration process and thereby breached their duty of fair representation.[1] *See Huffman v. Westinghouse Electric Corp.*, 752 F.2d at 1223. As a result, federal law obligated plaintiff to exhaust his contract remedies before bringing suit under section 301. Because plaintiff failed to exhaust his contract remedies, the district court properly granted summary judgment for defendant on plaintiff's involuntary resignation claim.

V. PLAINTIFF'S DEFAMATION CLAIM

After construing plaintiff's involuntary resignation claim as a section 301 claim, and dismissing the claim for

[1] Furthermore, plaintiff's case fails to fall within any other exception to the exhauston rule. *See D'Amato v. Wisconsin Gas Co.*, 760 F.2d at 1488-89

failure to exhaust contract remedies, the district court additionally dismissed plaintiff's defamation claim. In dismissing the defamation claim, the district court relied on *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), where the Supreme Court observed that state law claims joined to federal questions under the doctrine of pendent jurisdiction should usually be dismissed if the federal questions to which they are attached are dismissed pretrial. The district court also noted that the defamation claim appeared to be untimely under Illinois' one-year statute of limitations for defamation actions. ILL. REV. STAT. ch. 110 § 13-201 (1983).

This court finds that the district court correctly applied the rule of *United Mine Workers v. Gibbs*, 383 U.S. at 726, in dismissing the defamation claim. The defamation claim would survive the preemptive effect of federal labor law, and require application of state law, if plaintiff could prove that Pepsi's agents falsely accused plaintiff of theft, with knowledge that the accusations were false or with reckless disregard as to their truth or falsity.[2] *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. at 61. Such a claim would not fall within the jurisdiction of the federal courts, however, assuming no diversity of citizenship existed, unless it were linked to a federal question by means of pendent jurisdiction. In this case, the prerequisite federal question disappeared before trial. Because no additional federal questions remained, and because diversity of citizenship did not exist between plaintiff, an Illinois resident, and Pepsi, a corporation with its principal place of business in Illinois, the district court correctly dismissed the defamation claim.

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[2] If plaintiff could not prove that defendant's agents made the accusations with such "actual malice" the claim would likely be preempted by federal labor law. *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. at 64-65.

VI. CONCLUSION

This court holds that the district court correctly entered summary judgment for defendant on plaintiff's claim for tortious termination of employment on the ground that plaintiff failed to exhaust his contract remedies. This court additionally holds that the district court correctly dismissed plaintiff's defamation claim under the doctrine of pendent jurisdiction. This court therefore AFFIRMS the judgment of the district court.

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—9-3-85—450

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

September 3, 1985.

No. 84-2949

BEFORE

HON. RICHARD D. CUDAHY, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. WILBUR F. PELL, JR., Circuit Judge

WILLIAM G. MITCHELL,
Plaintiff-Appellant,

v.

PEPSI-COLA GENERAL BOTTLERS, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, a/k/a AUTOMOBILE MECHANICS UNION #701,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division
No. 84 C 5054
Judge John F. Grady

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM G. MITCHELL,
Plaintiff,

v.

NO. 84 C 5054

PEPSI-COLA GENERAL BOTTLERS, INC., et al.,
Defendants.

MEMORANDUM OPINION

This action for damages resulting from loss of employment was initiated in the Circuit Court of Cook County, Illinois, and was removed to this court by defendants pursuant to 28 U.S.C. § 1441 as a case arising under the laws of the United States, specifically § 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185. Plaintiff opposes removal and has moved to remand the case to the Circuit Court.

BACKGROUND

Plaintiff William G. Mitchell was employed by defendant Pepsi-Cola General Bottlers, Inc. until his resignation in May 1982. Plaintiff alleges in his complaint that he resigned under duress, following threats and accusations by defendant that plaintiff had stolen tools from the company. While employed by defendant, plaintiff was a member of the Automobile Mechanics' Local # 701 of the International Association of Machinists and Aerospace Workers, AFL-CIO, and was covered by the collective bargaining agreement in force between the union and the defendant. The collective bargaining agreement contained a grievance and arbitration procedure, but plaintiff makes no mention of whether he attempted to follow

this procedure before filing suit. Defendants allege in their answer that plaintiff invoked grievance proceedings as provided in the agreement.

In May 1984, plaintiff filed suit in state court seeking monetary compensation from defendant Pepsi-Cola for damages caused by defendant's wrongful accusations of theft, which plaintiff claims caused his resignation. Plaintiff then amended his complaint to add a claim against his union for conspiring with Pepsi-Cola to deny him his rights under the collective bargaining agreement. Pepsi-Cola and the union moved jointly to remove the case as a suit for violation of a collective bargaining agreement under § 301 of the Labor Management Relations Act. When plaintiff found himself in federal court, he voluntarily dismissed his claim against the union, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, and later filed this motion to remand the remaining claims against defendant Pepsi-Cola to state court.

Plaintiff argues that following the voluntary dismissal of claims against the union, the only cause of action remaining is a common law tort claim for wrongful, fraudulent and malicious conduct by defendant Pepsi-Cola, and as there is no diversity of citizenship in the case, the federal courts have no jurisdiction. Defendant responds that the true nature of plaintiff's claim remains a suit for breach of the collective bargaining agreement, and that plaintiff cannot avoid federal jurisdiction of the case by artful pleading.

DISCUSSION

I. Is Removal Proper in this Case?

Under § 301 of the Labor Management Relations Act, suits for violation of contracts between employers and unions may be brought in federal court without regard to the amount in controversy or diversity of citizenship.[1] Such suits may be

[1] § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, reads, in pertinent part:

(Footnote continues on following page)

heard in state court as well, but all actions arising under § 301 are governed by federal law, and any alternative remedies otherwise available under state law for breach of contract are preempted by federal labor law remedies. The United States Supreme Court has stated that, "the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for 'violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, nothwithstanding the fact that state law would provide a cause of action in the absence of § 301." *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 103 S.Ct. 2841, 2853 (1983). Accordingly, a claim for breach of a collective bargaining agreement under § 301 is one that arises "under the laws of the United States," as required by the removal statute, 28 U.S.C. § 1441(b). *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers,* 390 U.S. 557, 560 (1968); *see also Franchise Tax Board, supra,* 103 S.Ct. at 2853.

Plaintiff contends, however, that his complaint does not allege a claim for wrongful discharge or any other breach of the collective bargaining agreement, but is instead a state claim for tortious conduct that does not fall under the terms of § 301. It is true that while plaintiff's complaint does refer to plaintiff's membership in the union and the collective bargaining agreement he was employed under, nowhere on the face of the complaint does plaintiff allege that defendant Pepsi-Cola violated the terms of the agreement itself. Although under the "well-pleaded complaint" rule, a case may be removed to

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(Footnote continued from preceding page)

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

federal court only if the complaint itself raises a question of federal law, without regard to the defenses that may be posed, *see Franchise Tax Board, supra,* 103 S.Ct. at 2846-48; *Louisville & Nashville Railroad Co. v. Mottley,* 211 U.S. 149, 152 (1908), a plaintiff may not avoid federal jurisdiction by failing to plead necessary elements of his case. *Franchise Tax Board, supra,* 103 S.Ct. at 2853. "A complaint that is 'artfully pleaded' to avoid federal jurisdiction may be recharacterized as one arising under federal law." *Olguin v. Inspiration Consolidated Copper Co.,* 740 F.2d 1468, 1472 (9th Cir. 1984). Therefore, where a complaint makes allegations which would otherwise be covered by the terms of the collective bargaining agreement, the omission of any reference to § 301 or to the agreement itself in the complaint does not preclude removal to federal court. *See Olguin, supra,* 740 F.2d at 1472-73; *Eitmann v. New Orleans Public Service, Inc.,* 730 F.2d 359, 365 (5th Cir. 1984); *Fristoe v. Reynolds Metals Co.,* 615 F.2d 1209, 1212 (9th Cir. 1980); *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers,* 376 F.2d 337, 340 (6th Cir. 1967), *aff'd,* 390 U.S. 557 (1968).

In this case, plaintiff alleges that the defendant "wrongfully, maliciously and fraudulently" accused plaintiff of the theft of certain tools, and that as a result of these accusations, the defendant threatened plaintiff and forced him to resign. Plaintiff argues that because he was not discharged by the company, but instead resigned, his complaint is not one for wrongful discharge, and is therefore not a claim covered by the collective bargaining agreement. Plaintiff may not have been actually fired by defendant, but the crux of plaintiff's complaint is that his departure from the company was wrongfully procured by defendant through false accusations of theft. The collective bargaining agreement specifically refers to cases of alleged theft by employees and requires the employer to prove that an employee has been stealing before discharging that employee. Art. XI, *Discharging Employees,* Agr. Betw. Pepsi-Cola Gen'l. Bottlers Inc. and Local No. 701. The agreement

also provides for the safeguarding and loss of tools in a separate section. *See* Art. X, *Tool Insurance.* Thus, the company and the union clearly anticipated that disagreements over the loss of tools and charges of theft by employees would arise and established grievance and arbitration procedures to settle such disagreements. *See* Art. XVIII, *Grievances-Arbitration* (procedures apply to "all difficulties and misunderstandings which may arise out of the application or interpretation of this agreement."). Plaintiff's suit, which arises out of defendant's handling of a case of allegedly stolen tools, is therefore covered by the collective bargaining agreement, and falls under the terms of § 301. Removal of this case, as one arising under federal law, is therefore proper, and plaintiff's motion to remand is denied.[2]

II. Has Plaintiff Stated a Cause of Action Under § 301?

Under federal labor law, employees are entitled to sue their employers for breach of a collective bargaining agreement, but they must first attempt to exhaust any remedies available under the terms of the agreement itself. As the United States Supreme Court noted in *Republic Steel Corp. v.*

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[2] Plaintiff also argues that the Labor Management Relations Act has not preempted state law remedies for tortious conduct such as that complained of here. Since we find that plaintiff's complaint is in fact a claim for breach of the collective bargaining agreement, we need not reach a decision on the preemption question. However, we disagree with plaintiff's blanket assertion that the Labor Management Relations Act has not preempted state remedies for any tortious activity. Plaintiff has failed to note that the Supreme Court has recognized exceptions to the preemption doctrine only in the most limited cases, such as malicious libel and violent activity, and has stated that the states retain power only over activity which is "merely peripheral" to the LMRA, or involves interests "so deeply rooted in local feeling and responsibility" that it is not possible to infer that Congress intended to deprive the states of their power. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959). The conduct involved in this case does not appear to fall within these narrow exceptions.

Maddox, 379 U.S. 650, 653 (1965), "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant . . . it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so." *See also Macon v. Youngstown Sheet and Tube Co.*, 698 F.2d 858, 860 (7th Cir. 1983).

Employees who have not finally exhausted their contractual remedies may still bring suit for breach of a collective bargaining agreement, only if they can establish that their union breached its duty to fairly represent them. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 2290-91 (1983); *Superczynski v. P.T.O. Services, Inc.*, 706 F.2d 200, 204 (7th Cir. 1983); *Cote v. Eagle Stores, Inc.*, 688 F.2d 32, 35 (7th Cir. 1982).[3]

Plaintiff's complaint in this case alleges neither exhaustion of contractual remedies nor breach by his union of its duty to fairly represent him. The complaint thus fails to allege essential elements necessary to state a claim for violation of the collective bargaining agreement under § 301 of the Labor Management Relations Act. We therefore *sua sponte* dismiss plaintiff's complaint without prejudice.[4] Plaintiff may refile his case after

---

[3] In such cases, the union and the employer are generally joined as defendants in a single suit, although that need not always be the case. The Supreme Court has noted that "[t]he employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other or both." *DelCostello, supra*, 103 S.Ct. at 2291. Thus an employee suing an employer alone for breach of a collective bargaining agreement must still prove that the union breached its duty of fair representation, even if the union is not a party to the suit. *Id.* at 2290-2291.

[4] Count II of plaintiff's complaint stated a claim against defendant for slander and defamation. We need not decide this state law

(Footnote continues on following page)

exhausting the contractual remedies available, if he believes he still has a claim against his employer for breach of the collective bargaining agreement.[5]

ENTER: /s/ JOHN D. GRADY
United States District Judge

DATED: October 26, 1984

(Footnote continued from preceding page)

claim. United Mine Workers v. Gibbs, 383 U.S. 715, 725-27 (1966), although we note that this count may Ill. barred by the one-year statute of limitations for defamation actions. *See* Ill. Rev. Stat. ch. 110, § 13-201.

[5] We are unable to discern from the record before us the current status of plaintiff's contractual remedies. We therefore express no opinion as to whether plaintiff has any remedies left under the collective bargaining agreement, or whether those remedies have now expired due to the passage of time.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM G. MITCHELL, *Plaintiff,*	
v.	No. 84 C 5054
PEPSI-COLA GENERAL BOTTLERS, INC., et al., *Defendants.*	

DISMISSAL ORDER

This cause is hereby dismissed *sua sponte* for failure to allege essential elements necessary to state a claim for violation of the collective bargaining agreement under § 301 of the Labor Management Relations Act. This dismissal is without prejudice to refiling after exhaustion of remedies under the collective bargaining agreement.

ENTER: /s/ JOHN F. GRADY
United States District Judge

DATED: October 26, 1984

MOTION CALL C

Attorney No. 27669

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

WILLIAM G. MITCHELL,
Plaintiff,

vs.

No. 84 L 9800

PEPSI-COLA GENERAL BOTTLERS, INC.,
Defendant.

COMPLAINT AT LAW

NOW COMES the Plaintiff, WILLIAM G. MITCHELL, by his attorney, JULIUS PADEGIMAS, and complaining of the Defendant, PEPSI-COLA GENERAL BOTTLERS, INC., states as follows:

COUNT I

1. That the Defendant, PEPSI-COLA GENERAL BOTTLERS, INC., at all times herein mentioned was a duly existing corporation licensed to do business in the State of Illinois, having its principal place of business in the City of Chicago, County of Cook and the State of Illinois.

2. That the Plaintiff, William G. Mitchell, until the 18th of May, 1982, and for some time prior thereto, was an employee of the Defendant, Pepsi-Cola General Bottlers, Inc.

3. That the Plaintiff, at the time of his employment with the Defendant, was a member of the Automobile Mechanic's Local #701, International Association of Machinists and Aerospace Workers, AFL/CIO, and that as such he was an employee, a beneficiary of a certain agreement entered into by the Defendant, Pepsi-Cola General Bottlers Inc. and the said Automobile Mechanics Local #701,, a copy of which agreement is attached hereto as Exhibit A.

4. That sometime prior to May 18, 1982, the Plaintiff was assigned to work at the Defendant's facility in Elk Grove Village, and that while at work at the said facility, Defendant, by and through its agent, a superior of the Plaintiff, John Sheehan, transferred the Plaintiff to work at its Gurnee, Illinois, facility.

5. That at the time the Plaintiff moved to the Gurnee facility of the Defendant pursuant to the instructions of the aforesaid John Sheehan, the Plaintiff's supervisor and agent of the Defendant, he took with him certain tools used in his employment with the Defendant from the Elk Grove facility of the Defendant, to the Gurnee facility of the Defendant.

6. That the above tools referred to, were used by the Plaintiff, in his employment with the Defendant, at the Defendant's Gurnee facility.

7. That the Defendant, through its agent and employee, John Sheehan, knew of the said transfer of tools by the Plaintiff, from the Defendant's Elk Grove Village facility, to its Gurnee facility.

8. That the Defendant, by and through its agent, John Sheehan, on May 18, 1982, did wrongfully, maliciously and fraudulently accuse the Plaintiff of theft of the said tools.

9. That the Defendant, by and through its agent, John Sheehan, then threatened the Plaintiff, and duressed him into signing a resignation terminating his employment with the Defendant.

10. That as a direct and proximate result of the wrongful malicious, fraudulent actions, threats and duress, the Plaintiff was caused to suffer and shall hereafter suffer losses of great sums of money in the gainful employemnt that he had.

WHEREFORE, Plaintiff prays for judgment in the amount of $100,000.00 as and for compensatory damages, as $500,000.00 as and for punitive damages.

COUNT II

1. Plaintiff reaffirms and realleges Paragraphs 1 through 9 of Count I of his complaint as Paragraphs 1 through 9 of Count II of his complaint and further states as follows:

10. That the Defendant, by and through its agent and employee, John Sheehan and others, by its wrongful, false, malicious accusations, knowing full well the falseness of its accusations concerning the Plaintiff, slandered and defamed the Plaintiff, impuning his integrity, and that their actions are slander per se.

11. That as a direct and proximate result, by the fraudulent, malicious, false, slanderous and defamatory accusations, the Plaintiff has been injured in his good name and reputation, and caused to suffer financially and emotionally thereby, and shall continue to so suffer.

WHEREFORE, Plaintiff prays for judgment against the Defendant in the amount of $100,000.00 for compensatory damages and for $500,000.00 as and for punitive damages and the costs of this suit.

/s/ JULIUS PADEGIMAS
Attorney for Plaintiff

JULIUS PADEGIMAS
Attorney at Law
100 West Monroe St.
Suite 1200
Chicago, Illinois 60603
Phone: (312) 726-0756

FILED
1984 MAY 18 PM 12:02
CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
LAW DIVISION

Attorney No. 27669

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

WILLIAM G. MITCHELL,
Plaintiff,

vs.

Gen. No. 84 L 9800

PEPSI-COLA GENERAL BOTTLERS, INC., and INTERNATIONAL ASSOCIATION OF MECHANICS AND AEROSPACE WORKERS, a/k/a AUTOMOBILE MECHANIC'S UNION #701,
Defendants.

FIRST AMENDED COMPLAINT

NOW COMES WILLIAM G. MITCHELL, by his attorney, JULIUS PADEGIMAS, and complaining of the Defendants, PEPSI-COLA GENERAL BOTTLERS, INC., and INTERNATIONAL ASSOCIATION OF MECHANICS AND AEROSPACE WORKERS, a/k/a AUTOMOBILE MECHANIC'S UNION #701.

COUNT I

Realleges Paragraphs 1 through 10 of Count I in its entirety of his Complaint at Law heretofore filed as and for Count I of this, his First Amended Complaint at Law.

COUNT II

Plaintiff realleges Paragraphs 1 through 11 of Count II in its entirety of his Complaint at Law heretofore filed as and for Count II of this, his First Amended Complaint at Law.

COUNT III

Plaintiff reaffirms and realleges Paragraphs 1 through 9 of Count I of his Complaint at Law heretofore filed, as and for Paragraphs 1 through 9 of Count III of this, his First Amended Complaint and further states as follows:

10. That the plaintiff at sometime subsequent to May 18, 1982, advised the Defendants hereto, PEPSI-COLA GENERAL BOTTLERS, INC., and INTERNATIONAL ASSOCIATION OF MECHANICS AND AEROSPACE WORKERS, a/k/a/ AUTOMOBILE MECHANIC'S LOCAL #701, of the wrongful acts of the defendant, Pepsi-Cola General Bottlers, Inc., as hereinabove set forth, and made demand upon the Defendants herein for an assertion of such rights as may the plaintiff have under the contract and agreement entered into by the Defendants, Pepsi-Cola General Bottlers, Inc. and the said Automobile Mechanic's Local #701.

11. That the Defendants Pepsi-Cola General Bottlers, Inc., and International Association of Mechanics and Aerospace Workers, a/k/a Automobile Mechanic's Local #701, in concert and by agreement with each other conspired to deprive and deny the plaintiff of such rights as may exist under the said contract and did so willfully and wantonly, denying him his rights, to cause great financial injury to the plaintiff.

WHEREFORE, Plaintiff prays for judgment against the Defendants and each of them in the amount of $100,000.00 for compensatory damages and $500,000.00 as and for punitive damages and the costs of this suit.

/s/ JULIUS PADEGIMAS
Attorney for Plaintiff

JULIUS PADEGIMAS
Attorney at Law
100 West Monroe St.
Suite 1200
Chicago, Illinois 60603
Phone: (312) 726-0756

RECEIVED
Jul 3, 1984
H. STUART CUNNINGHAM
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM G. MITCHELL,
Plaintiff,

vs.

PEPSI-COLA GENERAL BOTTLERS, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, a/k/a AUTOMOBILE MECHANICS UNION #701,
Defendants.

Case No. 84 C 5054

MOTION TO REMAND

NOW COMES the Plaintiff, WILLIAM G. MITCHELL, by his attorney, JULIUS PADEGIMAS, and states as follows:

1. That the above cause of action was initially filed in the Circuit Court of Cook County, Illinois, and thereafter removed to the Federal Court, by the Defendants, on the grounds that there was a count in the complaint wherein the Federal Courts had original jurisdiction.

2. That the plaintiff in initially filing his action, never invoked the jurisdiction of the Federal Court.

3. That on June 18, 1984, pursuant to Federal Rule 41a(1) the plaintiff took a Voluntary Non-Suit on Count III of the Amended Complaint, which count contained the cause of action that the defendants conferred original jurisdiction on the Federal Court.

4. That since the aforesaid voluntary dismissal, there are no causes of action stated wherein there would be original jurisdiction in the Federal Court, but that rather two Counts remain cognizable under common law and within the competence of the Circuit Court of Cook County's jurisdiction.

WHEREFORE, plaintiff prays that this matter be remanded back to the Circuit Court of Cook County, Illinois, where this cause orginated.

/s/ JULIUS PADEGIMAS
Attorney for Plaintiff

JULIUS PADEGIMAS
100 West Monroe St.
Suite 1200
Chicago, Illinois 60603
Phone: (312) 726-0756

RECEIVED
Jul 11, 1984
H. STUART CUNNINGHAM
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM G. MITCHELL,
Plaintiff,

v.

PEPSI-COLA GENERAL BOTTLERS, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, a/k/a AUTOMOBILE MECHANICS UNION #701,
Defendants.

Case No. 84 C 5054
Judge Grady

NOTICE OF FILING

TO: Julius Padegimas, Esq.
Suite 1200
100 West Monroe Street
Chicago, Illinois 60603

William A. Widmer, Esq.
Carmell, Charone & Widmer, Ltd.
Suite 1110
39 South LaSalle Street
Chicago, Illinois 60603

PLEASE TAKE NOTICE that the undersigned has this 11th day of July, 1984, filed with the United States District Court for the Northern District of Illinois, Eastern Division, Defendant Pepsi-Cola General Bottlers, Inc.'s Memorandum In

Opposition To Plaintiff's Motion To Remand, a copy of which is attached hereto and hereby served upon you.

/s/ JOHN L. COLLINS
John L. Collins
One of the Attorneys for Defendant
Pepsi-Cola General Bottlers, Inc.

Seyfarth, Shaw, Fairweather
& Geraldson
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM G. MITCHELL,
Plaintiff,
v.
PEPSI-COLA GENERAL BOTTLERS, INC., et al.,
Defendants.

Case No. 84 C 5054
Judge Grady

DEFENDANT PEPSI-COLA GENERAL BOTTLERS, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

PROCEDURAL BACKGROUND

This action arises out of Plaintiff's May 18, 1982 resignation from his employment as a mechanic with Defendant Pepsi-Cola General Bottiers, Inc. (hereinafter "the Company") after the Company discovered that he had misappropriated certain tools. During his employment, Plaintiff was a member of International Association of Machinists and Aerospace Workers, Automobile Mechanics Union Local 701 (hereinafter "the Union"). At all relevant times there was a collective bargaining agreement in force between the Company and the Union which provided, *inter alia,* that employees would only be discharged for just cause and that disputes between the parties would be subject to a grievance procedure culminating in binding arbitration. (The collective bargaining agreement, attached to Plaintiff's complaint as Exhibit A, is attached hereto as Exhibit 1.)

On May 18, 1984, the Company was served with a two count complaint Plaintiff filed in the Cook County Circuit

Court. Count I seeks damages for "losses of great sums of money in the gainful employemnt (sic)" Plaintiff had. Count II alleges that the Company defamed Plaintiff.

On May 23, 1984, Plaintiff served an amended complaint upon the Company which added a third count against both the Company and the Union. This count, like Count I, essentially claims that Plaintiff was denied rights owing to him under the collective bargaining agreement between the Company and the Union.

On June 14, 1984, the Company and Union removed the action to this Court under 28 U.S.C. § 1441(c), on the basis that Plaintiff's claim, properly construed, is that the Company breached the collective bargaining agreement in regard to him, and thus presents a federal question pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.[1] The Company then filed an answer and affirmative defenses in this Court on June 21, 1984.

On June 18, 1984, prior to the Company's filing of its answer, Plaintiff voluntarily dismissed the third count of his amended complaint. Plaintiff now seeks to have the case remanded to state court, contending that "since the aforesaid voluntary dismissal, there are no causes of action stated wherein there would be original jurisdiction in the Federal Court, but that rather two Counts remain cognizable under common law . . . ."

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[1] 29 U.S.C. § 185(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

ARGUMENT

I. IT IS CLEAR FROM THE FACE OF PLAINTIFF'S COMPLAINT THAT THE TRUE NATURE OF PLAINTIFF'S CLAIM IS FOR ALLEGED BREACH OF THE COLLECTIVE BARGAINING AGREEMENT.

Plaintiff's assertion that there is no longer a federal question subsequent to his dismissal of Count III of his amended complaint is plainly wrong. Fairly construed, Count I of his complaint alleges that his separation from employment was the result of the Company's breach of its collective bargaining agreement with the Union. Plaintiff makes a point of pleading that he was a member of the Union and that there was a collective bargaining agreement of which he was a beneficiary (Plaintiff's Complaint ¶ 3). Plaintiff even attached a copy of the agreement to his original complaint as "Exhibit A" to Count I. The relief he seeks in Count I is for "losses of great sums of money in the gainful employemnt (sic)" he had, *i.e.*, back pay. Clearly, the gravamen of Plaintiff's Count I is that the Company breached the collective bargaining agreement by allegedly causing his resignation. This squarely presents a federal question under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

This is so even though Plaintiff has artfully attempted to cloak the true nature of his claim in common law terms. The fact that he did not expressly refer to Section 301 in Count I does not operate to deny this Court jurisdiction. As the court stated on this precise point in *Turner v. General Motors Corp.*, 112 L.R.R.M. (BNA) 2420, 2421 (E.D. Mich. 1982):

> Plaintiff's complaint does not explicitly state that plaintiff is asserting a Taft Hartley section 301 action. Nevertheless, it cannot be denied that the complaint is permeated with references to the collective bargaining agreement that plaintiff's discharge supposedly breached. The issue, therefore, is whether a defendant can remove on the basis of section 301 where the facts alleged in the complaint fit within a violation of section 301.

> Upon considering this issue, the Court finds that the federal judiciary has unanimously allowed removal in this type of situation. If the plaintiff's complaint alleges breach of a collective bargaining agreement, the defendant has the right to style the action as a section 301 action to remove under 28 USC § 1441.

(Footnotes omitted). *Accord Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980) ("Mere omission of reference to LMRA § 301 in the complaint does not preclude federal subject matter jurisdiction"); *Watts v. Grand Union Co.*, 110 L.R.R.M. (BNA) 2635, 2636 (N.D. Ga. 1982) ("The failure to refer to Section 301 in the complaint does not preclude federal subject matter jurisdiction"). These cases make abundantly clear that it is the *substance* of Plaintiff's claims that is controlling for federal jurisdiction purposes, not the form in which Plaintiff has packaged them. Here it is clear from the face of Plaintiff's complaint that he is alleging breach of the collective bargaining agreement.

II. PLAINTIFF'S STATE LAW THEORIES IN COUNT I IMPERMISSIBLY INTERFERE WITH THE FEDERAL REGULATORY SCHEME GOVERNING NATIONAL LABOR POLICY AND THUS ARE PREEMPTED. ACCORDINGLY, THIS COURT HAS ORIGINAL JURISDICTION UNDER SECTION 301.

Plaintiff's assertion of alleged common law theories to contest his separation from employment does not deprive this Court jurisdiction because Plaintiff's state law theories are preempted by Section 301. This is not a case where Plaintiff's Count I allegations involve only " 'a merely peripheral concern of the Labor Management Relations Act . . . .' " *Farmer v. United Brotherhood Of Carpenters And Joiners*, 430 U.S. 290, 296 (1977); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Plaintiff is attempting to enforce the just cause provision of the collective bargaining agreement under common law theories in utter disregard of the grievance and arbitration procedure. This directly contravences the strong

national labor policy enunciated by Congress and the Supreme Court favoring labor arbitration to settle contract disputes. *See* Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d) ("Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement"); *Vaca v. Sipes,* 386 U.S. 171 (1967); *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960). Indeed, Plaintiff's Count I allegations are inextricably entwined with the just cause provision of the collective bargaining agreement. This is clearly not a case where "the state-court tort action can be adjudicated without resolution of the 'merits' of the underlying labor dispute," *i.e.,* whether the Company violated the collective bargaining agreement. *Farmer,* 430 U.S. 290, 304 (1977).

Fristoe v. Reynolds Metal Co., 615 F.2d 1209 (9th Cir. 1980) is particularly instructive on this point. There, as here, the plaintiff filed suit in state court contesting his discharge on state law theories including, *inter alia,* conspiracy and fraudulent misrepresentation. The Ninth Circuit upheld the removal of the case to federal court, holding that the doctrine of federal preemption *required* recharacterization of the plaintiff's complaint as one arising under Section 301. The court stated in relevant part:

> Mere omission of reference to LMRA § 301 in the complaint does not preclude federal subject matter jurisdiction. *The court's recharacterization of Fristoe's complaint as one arising under § 301 is required by federal preemption doctrines.*
>
> *When principles of federal labor law are involved, they supersede state contract law or other state law theories.* Republic Steel Corp. v. Maddox, 379 U.S. 650, 657, 85 S.Ct. 614, 618, 13 L.Ed.2d 580 (1965); Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v.

> Lucas Flour Co., 369 U.S. 95, 102-03, 82 S.Ct. 571, 576, 7 L.Ed.2d 593 (1962); Johnson v. England, 356 F.2d 44, 48 (9th Cir.), cert. denied, 384 U.S. 961, 86 S.Ct. 1587, 16 L.Ed.2d 673 (1966); accord, Sheeran v. General Electric Co., 593 F.2d 93, 96-97 (9th Cir. 1979).

(615 F.2d at 1212, emphasis added.) Likewise, in *Stanton v. Texaco,* 113 L.R.R.M. (BNA) 2731 (C.D. Cal. 1982) the court sustained the removal of a state court suit alleging intentional and negligent infliction of emotional stress arising out of discharge of a union member. Noting that "[t]he general rule in this context is that the policies of the federal labor laws preempt state causes of action to enforce workers' rights," 113 L.R.R.M. (BNA) at 2732, the court characterized the complaint as alleging wrongful discharge which presented a federal question under Section 301. Finally, the Sixth Circuit stated most succinctly on this point in *Avco Corp. v. Aero Lodge No. 735,* 376 F.2d 337, 339-40 (6th Cir. 1967), *aff'd,* 390 U.S. 557 (1968), "State law does not exist as an independent source of private rights to enforce collective bargaining contracts." Here, Plaintiff is clearly trying to enforce the terms of the collective bargaining agreement under state law theories.

The fact that Plaintiff's state law claims in Count I of his complaint are preempted by Section 301 provides this court original subject matter jurisdiction. *Avco Corporation v. Aero Lodge No. 735,* 390 U.S. 557 (1968); *Eitmann v. New Orleans Public Service, Inc.,* 730 F.2d 359 (5th Cir. 1984). As the Fifth Circuit stated in *Eitmann*:

> [C]ourts that have addressed the effect of preemption by section 301 have held that the federal courts have original subject matter jurisdiction over the action (Cites omitted)
>
> . . . .
>
> *. . . Therefore, we hold that, where a state cause of action is preempted by section 301, the federal courts have original subject matter jurisdiction over the action despite the absence of a federal claim on the face of the complaint. In such a case, which raises the spectre of "artful pleading,"*

the court must necessarily be guided by the substance rather than the form of the complaint.

(730 F.2d at 366, emphasis added.) Here, the substance of Count I of Plaintiff's complaint compels the conclusion that this Court has original jurisdiction under Section 301. Accordingly, this case remains properly before this Court pursuant to 28 U.S.C. § 1441(c), notwithstanding that Plaintiff has voluntarily dismissed Count III.

Plaintiff's Motion To Remand, therefore, should be denied.

Respectfully submitted,

PEPSI-COLA GENERAL BOTTLERS, INC.

By /s/ JOHN L. COLLINS
One Of Its Attorneys

William R. Sullivan, Jr., Esq.
John L. Collins, Esq.
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

CERTIFICATE OF SERVICE

John L. Collins, one of the attorneys for Defendant Pepsi-Cola General Bottlers, Inc., certifies that he caused a copy of the foregoing Defendant Pepsi-Cola General Bottlers, Inc.'s Memorandum In Opposition To Plaintiff's Motion To Remand to be served by messenger, hand delivered, addressed as follows, before 10:30 a.m. this 11th day of July, 1984:

Julius Padegimas, Esq.
Suite 1200
100 West Monroe Street
Chicago, Illinois 60603

William A. Widmer, Esq.
Carmell, Charone & Widmer, Ltd.
Suite 1110
39 South LaSalle Street
Chicago, Illinois

/s/ JOHN L. COLLINS
John L. Collins

Beverage 1979-1982

AGREEMENT

The intention of the following agreement is to continue the harmonious relations existing between *PEPSI-COLA GENERAL BOTTLERS, INC,* hereinafter referred to as the "Company", and AUTOMOBILE MECHANICS LOCAL NO. 701, International Association of Machinists & Aerospace Workers, AFL-CIO, 133 South Ashland Avenue, Chicago, Illinois 60607, hereinafter referred to as the "UNION".

ARTICLE I

RECOGNITION:

The Employer hereby recognizes the Union as the exclusive bargaining agent with respect to wages, hours and other conditions of employment for all lead mechanics, mechanics, helpers and apprentices but excluding, however, all office, clerical, administrative and professional employees, and supervisory employees with authority to hire, discharge, discipline or change the status of an employee, and all employees presently represented by other labor organizations.

(a) The Company when in need of any employees covered by this agreement shall notify the office of Automobile Mechanics Local No. 701. 133 South Ashland Avenue, Chicago, Illinois, 60607, phone 738-0123, at least twenty-four (24) hours prior to the time such employees are required to start to work.

(b) In the event the Automobile Mechanics Local No. 701 are unable to supply the Company with sufficient employees as covered by this Agreement the Company shall have the right to secure such employees as required in any manner whatsoever, provided, they shall notify the Union of the employment. Before reporting for work the employee so employed shall secure authorization cards at the Union office for immediate coverage under the Automobile Mechanics

Local No. 701 Union & Industry Welfare Plan and the Automobile Mechanics Local No. 701 Union & Industry Pension Plan.

(c) All present employees within the terms of this agreement must become and remain members in good standing in accordance with the Union's constitution and by-laws on or after thirty-one (31) days of the date of employment as a condition of employment with the Company.

(d) In exceptional cases a reasonable extension of the probationary period not to exceed thirty (30) additional days will be granted if requested by the Company.

(e) All new employees within the terms of this agreement must become and remain members in good standing in accordance with the Union's constitution and by-laws on or after thirty-one (31) days of the date of employment as a condition of employment with the Company.

(f) Any employee in the bargaining unit who fails to maintain membership in the Union because of non-payment of initiation fees or dues shall be summarily discharged by the Company upon receipt of written notice and demand from the Union, and the Union shall hold the Company harmless against any claim, suits or liability resulting therefrom.

ARTICLE II

MINIMUM WAGE RATES:

Employees who were receiving above the minimum contract wage rate for their respective classification at the expiration of the previous agreement shall suffer no reduction and shall be paid the hourly increases effective September 1, 1979, as negotiated in this agreement.

WAGES:	Increase Per Hour:					
(Retro.)	Eff.: 9/1/79	Eff.: 3/1/80	Eff.: 9/1/80	Eff.: 3/1/81	Eff.: 9/1/81	Eff.: 3/1/82
Lead Mechanic.....	1.00	.30	.60	.30	.60	.30
Mechanic	1.00	.30	.60	.30	.60	.30
Body Repair	1.00	.30	.60	.30	.60	.30
Helper.....	1.00	.30	.60	.30	.60	.30

Apprentices (Hired Prior to 9/1/76)

Will participate under the concept of the present wage schedules, i.e., $1.00, .30¢, .60¢, .30¢, .60¢, .30¢ per hour increases plus step increases.

Apprentices—Effective September 1, 1976:

All apprentices hired on or after Sept. 1, 1976 will be paid under the following pay percentage scale:

1st six months	65% of Journeyman mechanic rate.
2nd six months	67%
3rd six months	70%
4th six months	75%
5th six months	80%
6th six months	85%
7th six months	90%
8th six months	95%
Thereafter	100%

HOURLY WAGE RATE STRUCTURE:

	9/1/79 to 3/1/80	3/1/80 to 9/1/80	9/1/80 to 3/1/81	3/1/81 to 9/1/81	9/1/81 to 3/1/82	3/1/82 to 9/1/82
Lead Mechanic...	11.36	11.66	12.26	12.56	13.16	13.46
Mechanic	11.11	11.41	12.01	12.31	12.91	13.21
Body Repair	11.11	11.41	12.01	12.31	12.91	13.21
Helper.....	10.37	10.67	11.27	11.57	12.17	12.47

Apprentices—Hired Prior to September 1, 1976

	9/1/79 to 3/1/80	3/1/80 to 9/1/80	9/1/80 to 3/1/81	3/1/81 to 9/1/81	9/1/81 to 3/1/82	3/1/82 to 9/1/82
First six months	9.95	10.25	10.85	11.15	11.75	12.05
Second six months	10.00	10.30	10.90	11.20	11.80	12.10
Third six months	10.06	10.36	10.96	11.26	11.86	12.16
Fourth six months	10.21	10.51	11.11	11.41	12.01	12.31
Fifth six months	10.32	10.62	11.22	11.52	12.12	12.42
Sixth six months	10.42	10.72	11.32	11.62	12.22	12.52
Seventh six mos.	10.53	10.83	11.43	11.73	12.33	12.63
Eighth six mos.	10.63	10.93	11.53	11.83	12.43	12.73

Thereafter, they shall receive the mechanics rate of pay.

NO REDUCTION: Employees receiving above these rates of pay shall suffer no reduction through putting this agreement into effect.

NIGHT SHIFT: Persons employed on the night shift shall receive an additional fifteen cents (15¢) per hour over and above their regular day rate. This shall constitute their regular rate of pay.

Where night shift employees work overtime that is, any time after eight (8) hours during work week Monday to Friday inclusive or on Saturday shall be paid for overtime at time and one-half (1½) the night shift rate. Sunday overtime shall be paid at double time the night shift rate.

Description of Night Shift: Night shift shall mean any shift that starts before 6:00 a.m., or ends after 6:00 p.m., but the night shift rate shall not apply when day employees are working after 6:00 p.m. and being paid overtime for the same.

SAVINGS CLAUSE: If any provision of this agreement is or shall be in contravention of the law or regulations of the United States or of the State of Illinois, all other provisions of this agreement shall continue in full force and effect, and both parties to this agreement agree to discuss any article or section of this agreement so affected.

ARTICLE III

WORK SCHEDULE—GUARANTEE:

Eight (8) consecutive hours excluding lunch period shall be the standard work day and forty (40) hours shall constitute the work week, Monday to Friday inclusive. The work day shall begin at the employer's regularly established starting time and shall not be changed from day to day in a guarantee work week.

NIGHT SHIFT: Employees on night shift shall work the forty (40) hours in five (5) nights, Monday to Friday inclusive, starting each night at the same time. Overtime shall be paid after eight (8) hours per night and for Saturday and Sunday. Vacation and holiday pay shall be at the night shift rate.

GUARANTEE: All employees within the terms of this agreement shall be guaranteed not less than forty (40) straight time hours of work per week, Monday through Friday. The guarantee shall be proportionately reduced by an employee's absence or where an employee is discharged for just cause.

The above guarantee of forty (40) hours per week shall apply only to any week in which an employee performs any work and shall not be regarded as an obligation to compensate an employee for any week in which no work was performed by such employee nor as prohibiting the company from reducing the number of employees assigned to work for any one or more weeks.

ARTICLE IV

HOLIDAYS:

All employees coming under the jurisdiction of this Agreement shall be paid for the following holidays regardless of the day of the week on which the holiday shall fall:

New Year's Day	Labor Day
Washington's Birthday	Thanksgiving Day
Memorial Day	Christmas Day
July Fourth	

The hours of the employee's regular shift shall constitute a day's pay for the above holidays.

Employees who are required to work on any of these holidays shall be paid at the rate of straight time for the holiday plus additional double time for the hours worked on the holiday, with a minimum call of four hours. To receive pay for the holiday the employee must work the last scheduled work day before and the first scheduled work day after the holiday unless excused by the employer for either or both days preceding and following the holiday. Any employee on authorized leave of absence or sick leave must work either the day before or the day after the holiday to receive holiday pay.

Holiday work shall be rotated among employees of each classification as evenly as practicable.

A holiday shall be counted as a day worked in computing overtime.

Any of the above holidays falling on Sunday, the day observed by the state, nation or by proclamation shall be observed as such.

ARTICLE V

BIRTHDAY LEAVE:

All employees coming under the jurisdiction of this Agreement shall be paid for their birthday, regardless of the day of the week on which it falls. Employees shall receive eight (8) hours at their regular straight time rate including shift premiums, when they do not work on their birthday, provided the employee gives the Company five (5) days notice of their intention not to work. Employees electing to work on their birthday shall receive birthday pay in addition to straight time earnings for said day or night.

Time and one-half (1½) shall be paid for all time worked over the regular day or night schedule, as set forth in Article III of this Agreement.

When an employee is called for overtime and this overtime is consecutive with that employee's regular shift, the four hours guarantee shall not apply. Employees shall be paid time and one-half (1½) for all overtime worked except Sunday and holiday work which is at double time.

Overtime shall not be paid on overtime or premium pay.

A minimum of four hours at time and one-half (1½) shall be paid for all emergency and Saturday work. A minimum of four hours at double time shall be paid for all Sunday and holiday work.

Overtime shall be rotated among employees of each classification as evenly as practicable.

An employee shall work overtime as originally scheduled regardless if he works as an alternate employee for another employee's scheduled overtime (Saturday, Sunday or holiday).

In no case shall any employees coming under the jurisdiction of Automobile Mechanics Local No. 701 take time off for over-time worked.

If insufficient employee(s) accept an overtime assignment, the least senior employee(s) in the classification on the shift capable of performing the work will be required to perform the work, moving up the seniority list until sufficient employees are available to do the work.

INDIVIDUAL NEGOTIATING: Neither the employer nor any of his employees shall enter into any oral or written agreements, arrangements or contracts that are contrary to this agreement.

ARTICLE VII

VACATIONS:

Full vacation pay shall be given to employees at their regular rate of pay before starting on their vacation.

An employee who receives pay for work performed for the Company in at least thirty-five (35) weeks during the twelve (12) months preceding the employee's anniversary date shall be eligible for a vacation.

Employees who have been continuously employed by the Company for a period of one year but less than two years shall be entitled to an annual vacation of one (1) week.

Employees who have been continuously employed by the Company for a period of two years but less than five years shall be entitled to an annual vacation of two (2) weeks.

Employees who have been continuously employed by the Company for a period of five years but less than ten years shall be entitled to an annual vacation of three (3) weeks.

Employees who have been continuously employed by the Company for a period of ten years but less than twenty years shall be entitled to an annual vacation of four (4) weeks.

Employees who have been continuously employed by the Company for a period of twenty years or more shall be entitled to an annual vacation of five (5) weeks.

Vacation period shall be from January 1 through December 31 and shall be granted according to seniority and job classification. Vacation herein provided may be taken in 7, 14, 21, 28 or 35 continuous days as the case may be.

Where a senior employee desires to split his/her vacation, his/her first choice of vacation shall count. After all employees have selected their vacations, the employee with a split vacation shall be allowed to select the balance of their vacation.

However, the final right to schedule vacations is reserved by the employer to insure the efficient and continuous operation of the employer's business.

Vacations provided for cannot be accumulative.

When one of the holidays designated in this agreement falls within an employee's scheduled vacation period the employee shall be granted either an additional day's pay or an additional day off with pay to be added to his/her vacation.

PRO-RATA VACATION: An employee who completes one year of accumulated service and thereafter separates from the Company's employ for any reason shall be entitled upon such separation to receive (a) payment in lieu of any vacation fully earned but not taken, and (b) payment in lieu of any vacation partially earned but not taken, computed on a pro-rata basis of the last day of service. The right to receive the payment mentioned in (b) shall be independent of and in addition to the right to receive the payment mentioned in (a).

ARTICLE VIII

FUNERAL LEAVE:

In the event of a death in the immediate family of an employee requiring his/her absence from work, that employee shall be afforded up to three (3) days off without loss of pay for the regular work days on which he/she would have worked but for the absence in order for the employee to attend the funeral. The amount of time taken off should be reasonably necessary under all circumstances. "Immediate family" shall mean spouse, son or daughter, mother or father, sister or brother and parents of current spouse.

ARTICLE IX

JURY DUTY:

The employer shall reimburse any employee who is required to serve on a jury—municipal, county, state or federal—for the difference between the amount of jury pay received and the amount such employee would have earned during the time he is serving on a jury on the basis of eight (8) hours straight time pay per day, Monday through Friday, at his/her regular rate of pay. The employer's obligation for jury duty shall be limited to a maximum of ten days in any one calendar year.

ARTICLE X

TOOL INSURANCE:

The Company shall maintain an insurance policy or assume the cost risk for loss of employee's personal tools, including tool box or tool boxes, or major portion thereof, on Company premises due to theft by break-in and entry or other circumstances acceptable to the Company. In the event of such loss, the Company shall have the option to replace the tools or reimburse the employee for such loss up to the actual cost of the tools stolen. It is understood that all employees must furnish the Company (foreman or lead mechanic) with a complete inventory of his personal tools. It is further understood that whenever new tools are purchased the employee must include them on the inventory list previously furnished. The employee will show reasonable care in the safeguarding of his own personal tools.

ARTICLE XI

DISCHARGED EMPLOYEES—WARNING NOTICES:

Employees shall not be discharged without just cause, such as, intoxication or drinking on the job; refusal to do work for which the employee was hired; stealing where same can be proven by the employer; or for any other justifiable reason.

In other instances, which shall be considered minor, the employer shall give the employee a warning notice, in writing, of such unsatisfactory work or conduct; and the proper official of Local No. 701 shall be given a copy of the warning notice. Warning notices shall be valid for a period of one year. The third notice shall subject the employee to discharge.

ARTICLE XII

SENIORITY:

In laying off employees or in returning employees to work after a layoff, seniority shall prevail in accordance with job classification. Any employee laid off shall carry his/her seniority for at least one year and the Company shall not only notify the employee that they wish him/her to return to work if such is the case but they shall also notify the Union that they are offering the laid off employee the opportunity to return to work. Employees recalled shall report for work within five (5) working days from the date of notification.

While bumping, as such, will not be permitted, an employee working nights and having been on the job at least one year may exercise his/her seniority if a day job shall be open providing he/she has the skill and ability to handle such day job. If the employer shall hire a new employee for a day job the employer shall have the right to keep the new employee on the day job for a period of at least six (6) months before transferring said employee to a night job.

The Company shall post all new job openings and permanent transfers on any shift or location, with a copy to the Union, giving the employee with seniority, if qualified, the right to bid this job opening within five (5) working days. If an employee is absent at the time the job opening is posted he/she shall be notified by certified mail. If a dispute arises over the qualification of an employee the matter shall be resolved between a proper official of the Union and a proper official of the Company.

Temporary assignments shall be for a minimum of one week beginning on a Monday. Any employee assigned as temporary to a location would be reimbursed for mileage at the rate of

fourteen cents (14¢) per mile in excess of the normal distance traveled to his/her regular assigned location. Temporary assignments shall be made on either a voluntary or seniority basis. Any employee assigned to handle an emergency situation shall be provided with transportation to and from such emergency work.

Where a helper changes classification to apprentice or mechanic, his/her seniority shall start at the time of the change (for layoff purposes only) but he/she shall retain seniority in the helper classification for a period of one (1) year from date of such change. In no case shall the employee lose his/her vacation benefits—his/her Company seniority shall apply.

Continuous service shall be broken and the employment relationship terminated when an employee is off work due to a non-occupational illness or injury for more than six (6) months, or in the case of an occupational illness or injury is off work for more than twelve (12) months.

Failure to return to work on schedule following an authorized leave of absence, or working at other employment while on an authorized leave of absence shall each constitute a break in continuous service and a termination of the employment relationship.

SENIORITY UNDER NEW COMPANY MANAGEMENT:

Where any Company, a Party to this agreement, shall merge with another Company, or where any Company, a Party to this agreement, shall take over another Company, the question of seniority of the employees of the company that is merging or of the Company that is being taken over shall be adjusted jointly between the officials of the Union and officials of the Company. If the employee's status of seniority cannot be satisfactorily adjusted between the Union and the Company the matter shall be referred to arbitration for settlement as provided under Article XVIII of this Agreement.

When, and if the Company shall sell or transfer its business to new ownership, it shall be obligated to its employees for all accumulated vacation allowances and other benefits of employment up to the time of sale or transfer. The new owner shall

have the right to notify the employees that they may continue in their employment and retain all of the benefits of same or he/she may notify them that as of the date of the assumption of ownership their status is that of new employees and thus afford to them the opportunity to seek employment elsewhere if they so desire. If he/she does not notify them that their status is that of new employees, he/she shall be obligated for all seniority rights and vacation pay.

ARTICLE XIII

DUES AND INITIATION FEES:

The Company where so authorized and directed in writing by an individual employee subject to this contract upon a form of authorization in conformity with the provisions of the Labor Management Relations Act of 1947, shall deduct initiation fees and dues from the pay of such employees the first pay day of the current month, and shall remit the same to the Secretary-Treasurer of the Union not later than the fifteenth (15th) day of the current month.

ARTICLE XIV

SUPERVISION & CLASSIFICATIONS:

In shops requiring multiple supervision an effort shall be made to use the chain of command.

Supervisors shall not replace any employee of the bargaining unit.

Supervisors shall be limited to using the tools of the trade only in the course of instruction or emergency situations.

LEAD MECHANIC: A lead mechanic is defined as a mechanic or machinist who is qualified to and does assign and direct the work of other employees in addition to his normal mechanic duties.

Appointments to or removal from Lead Mechanic are at the sole discretion of the Company and such positions are not posted. A Lead Mechanic removed for unsatisfactory per-

formance of Lead Mechanic responsibilities only, excluding violation of Company rules, shall be returned to his former classification.

MECHANIC: A mechanic includes any person who shall do any skilled labor on any part of the car, truck, trailer, tractor, automobile body or any internal combustion motor, excepting as provided for apprentice.

BODY REPAIR: A journeyman hired primarily for the purpose of doing metal work, wood work, painting, in the repair of reconditioning of tractors, trailers, straight trucks and bodies or parts thereof, but not limited to such work, excepting as provided for apprentice.

APPRENTICE: A ratio of one (1) apprentice to the shop and one (1) for each five (5) additional journeymen shall be allowed. An apprentice may do any work that the employer shall put him/her on under the supervision of the foreman (head Mechanic), body repair person or a mechanic. The Company shall set up a system of training for the apprentice who shall during his/her four years so that at the end of his/her apprenticeship he/she shall be a full-fledged, qualified, journeyman. No apprentice shall be allowed to remain on one kind of work more than six months.

An apprentice must demonstrate proficiency by passing practical work tests and appropriate written tests in the areas in which he has trained during the previous six (6) months.

HELPER: No employee classed as a helper shall do any skilled work other than helping the journeyman on skilled work and any other work classed as non-skilled that the employer shall put him/her on. A helper shall not be termed a learner mechanic; "learners" are covered under the apprenticeship classification. The term helper, being a broad term, applies to employees doing strictly unskilled work.

TOOL REQUIREMENTS:

All mechanics shall furnish small hand tools and the Company shall furnish all heavy duty tools, including cutting tools. In the event of a difference in opinion as to what constitutes "small hand tools" or "heavy duty tools" that cannot be adjusted between the proper official of the Company and a representa-

tive of Automobile Mechanics Local No. 701, then the dispute shall be referred to an Arbitration Committee as set up in Article XVIII of this Agreement.

ARTICLE XV

SAFETY & HEALTH:

The Employer, employees and the Union covered by this Agreement shall comply with all State and Federal Laws pertaining to safety and health standards.

No employee shall be required to work with faulty equipment that would jeopardize his personal safety.

In all cases where accidents occur during the course of employment which would require outside medical attention the employer shall provide for immediate transporation to a doctor or hospital by car or ambulance, and if the employee is unable to return to work he/she shall receive the balance of that days pay at his/her straight time hourly rate. Where it is possible to see the company doctor only during working hours, the employer shall pay the employee for the time lost at his/her regular straight time rate of pay if such visit is approved by the employer or employer's designated doctor.

ARTICLE XVI

PENSION FUND:

Effective and Retroactive to September 1, 1979:

The Employer shall be obligated to contribute the sum of seventeen dollars ($17.00) per week for each employee covered by this agreement to the Pension Fund of the Automobile Mechanics Local No. 701. (Payments shall be made so as to reach the Pension Fund office not later than the 10th of the following month—for example: the September payment shall be made not later than October 10th). The Fund shall in all respects be administered in accordance with the Trust Agreement drawn.

The Pension Plan shall be administered by the Board of Trustees composed of an equal number of employer trustees and union trustees. Employer trustees to be made up of those groups paying into said Pension Fund.

The employer's liability and method of payment is limited as follows:

(a) The amount of seventeen dollars ($17.00) per employee per week shall be contributed for each employee covered under the collective bargaining agreement for any week in which such employee performs any service for the employer, even when such service is not performed under the terms of the collective bargaining agreement. This shall apply to new employees from the date of hire.

(b) If an employee is absent because of non-occupational illness or injury, the employer shall continue to make the required seventeen dollars ($17.00) contribution for a period of four (4) weeks.

(c) If an employee is absent because of occupational illness or injury, the required seventeen dollars ($17.00) contribution shall be made until the employee returns to work or for a period of six months whichever period is the shorter.

(d) The obligation to make the above contribution shall continue during periods when the employee is not performing a direct service for the employer due to vacation, jury duty, funeral leave, and during periods when the collective bargaining agreement is being negotiated unless there is a work stoppage or lockout due to negotiations of the collective bargaining agreement.

Effective September 1, 1980, an additional two dollar ($2.00) per week employer contribution ($2.00 per week per employee).

Effective September 1, 1981, an additional three dollar ($3.00) per week employer contribution ($3.00 per week per employee).

ARTICLE XVII

HEALTH & WELFARE FUND:

$25.00 per Week—Effective and Retroactive to September 1, 1979.

The employer shall pay the sum of Twenty-Five dollars ($25.00) per week for each regular employee covered by this Agreement who performs any work in such week into the Automobile Mechanics Local No. 701 Union & Industry Welfare Fund for the payment of health and welfare benefits as determined by the Board of Trustees. Any disagreement with respect to the eligibility, time and method of payment, payments during periods of employee illness or disability, methods of enforcement of payment and related matters shall be determined by such Trustees. The Fund shall in all respects be administered in accordance with the Trust Agreement drawn. The method and amount of payment shall be as follows:

(a) The amount of $25.00 per employee per week shall be contributed for each employee covered under the collective bargaining agreement for any week in which such employee performs any service for the employer, even when such service is not performed under the terms of the collective bargaining agreement. This shall apply to new employees from the date of hire.

(b) If an employee is absent because of non-occupational illness or injury, the employer shall continue to make the required $25.00 contribution for a period of four weeks.

(c) If an employee is absent because of occupational illness or injury, the required $25.00 contribution shall be made until the employee returns to work or for a period of six months whichever period is the shorter.

(d) The obligation to make the above contribution shall continue during periods when the employee is not performing a direct service for the employer due to vacation, jury duty, funeral leave and during periods when the collective bargaining agreement is being negotiated unless there is a work stoppage or lockout due to negotiations of the collective bargaining agreement.

(e) All leaves of absence when granted by the employer, in addition to the requirements of the parties, shall be conditioned upon the employer and the employee making satisfactory arrangements for paying the $25.00 weekly contribution to the Health & Welfare Fund, and at all times the payment shall be made by the employer for the period of such granted leave of absence, not to exceed six months.

Effective September 1, 1980, an additional two dollar ($2.00) per week employer contribution ($2.00 per employee per week).

Effective September 1, 1981, an additional two dollar ($2.00) per week employer contribution ($2.00 per employee per week).

ARTICLE XVIII

GRIEVANCES—ARBITRATION:

Accredited representatives of Automobile Mechanics Local No. 701 shall be permitted to enter the shop of the Company for business purposes during day or night shifts.

An attempt shall be made to first settle all difficulties and misunderstandings which may arise out of the application or interpretation of this agreement with the proper official of the Company. To avoid unnecessary friction, business agents shall take up all grievances with principals or the accredited substitute or head of departments and not with subordinates. Such grievances shall be taken up during regular business hours only.

For a grievance to be valid, it must be presented to the employer and to the Union, in writing within thirty-one (31) days of the grievance occurrence.

ARBITRATION:

In the event of inability to satisfactorily adjust any matter, it shall be referred to the Arbitration Committee. The Company and the Union shall each select one arbitrator and the two shall attempt to agree upon a third or neutral arbitrator. Failing to agree upon a third or neutral arbitrator, such third arbitrator

shall be selected from a list of arbitrators from the American Arbitration Association. Such selection shall be made by the Union striking one name from such list and the Employer striking another, until one name alone remains. .The arbitrator whose name remains shall be Chairman of the Board of Arbitrators. The total arbitrator's fee incurred because of arbitration shall be borne equally by the Employer and the Union.

In view of the fact that the parties have provided for an orderly procedure for settling differences of opinions and disputes, the Union agrees that for the duration of this Agreement there shall be no strikes and the Company agrees that during the life of this Agreement there shall be no lockouts. Employees shall not be discharged for refusing to cross a legitimate picket line of a union recognized by the Company.

Notwithstanding any other provision of this agreement to the contrary, if the Company fails or refuses to remit the monthly Health & Welfare or Pension Fund contribution herein provided within twenty (20) days after a notice of delinquency is mailed to the Company via certified mail by the Administrator of the Health & Welfare and/or the Pension Fund, then, in such event, the Union without the necessity of giving any other or further notice shall have the right to strike or take such other legal action as it shall deem necessary or appropriate during the period that any delinquency shall continue.

The Union shall not have the right to strike as herein provided, if the Company notifies the Union in writing that a dispute exists concerning the amount of or liability for such contributions and the Company agrees to an does commence to avail themselves of the grievance procedure as set forth in this agreement, but in no event shall the time limit preclude the arbitrating of such dispute.

If in fact the Company is deemed delinquent, the Company shall be responsible to the employees for any losses of any Health & Welfare and/or Pension benefits resulting therefrom.

ARTICLE XIX

UNIFORMS:

Three (3) uniforms per week, selected by the Employer, shall be furnished and laundered at not cost to the employee.

ARTICLE XX

NON-DISCRIMINATION:

The Company, the Union and all employees covered by this Agreement agree that there shall be no discrimination against any employee or applicant for employment on account of race, creed, color, national origin, sex, or age (as provided in various laws), it being the intention of the Company, the Union and all employees covered by this Agreement to comply with all laws, federal, state and local, and Executive Orders which are applicable to the Company or the Union. There shall be no discrimination on account of Union membership or Union activity or lack thereof.

CHAUFFEURS LICENSE:

Where state law requires that it is necessary for an employee coming under the jurisdiction of this agreement to have an operator's license other than the normal A or B class license, the employer shall provide for the following:

1) Training in operation of vehicle
2) Vehicle to have required test
3) Reasonable amount of time to take required test or testing

Only employees qualified to operate Company owned vehicles shall be allowed to operate said vehicles either on or off the Company property. No employee shall be forced to operate any vehicle that he/she is not qualified to operate.

ARTICLE XXII

SICK DAYS:

During an agreement year, each employee who has one (1) year of service will be paid eight (8) times his regular hourly rate for each of two (2) days on which he is ill. In order to receive sick pay, the employee must be absent from work because of his illness for no less than five (5) consecutive workdays and return to work. If an eligible employee is not paid his sick days during an agreement year, he will be paid for the sick days he did not use at the above rate at the end of the agreement year.

ARTICLE XXIII

DURATION OF AGREEMENT:

This Agreement shall become effective this 1st Day of September, 1978 and shall continue in full force and effect through August 31, 1982 and shall continue automatically on an annual basis thereafter unless written notice is given by either party sixty (60) days prior to August 31, 1982 or August 31st of any subsequent year, as the case may be. The parties shall arrange negotiations as soon as conveniently possible.

SIGNED:

COMPANY

_____

By: _____

_____

AUTOMOBILE MECHANICS LOCAL NO. 701
IAM&AW., AFL-CIO

/s/ DONALD D. GUSTAFSON
Donald D. Gustafson, Pres. Bus. Mgr.

DATED: _____

LETTER OF UNDERSTANDING

This letter will confirm understanding reached during the recent negotiations. First, it was understood that employees will be allowed two fifteen minute rest breaks during each working day, one in the first part of the shift and one in the second part.

Secondly, it was agreed that tool salesmen would be given access to the employer's premises during working hours for the purpose of soliciting orders for their products. However, the Company shall have a right to require a salesman desiring access to request permission from the management prior to entering the premises. The Company shall have the right to limit access or to refuse access if the salesman's presence at that time might tend to interfere with the normal and efficient operation of the garage.

SIGNED:

COMPANY:

_____

BY: _____

_____

UNION:

AUTOMOBILE MECHANICS LOCAL NO. 701
IAM&AW., AFL-CIO

/s/ DONALD D. GUSTAFSON
Donald D. Gustafson, Pres. Bus. Mgr.

DATED: _____

RECEIVED
JUL 25, 1984
H. STUART CUNNINGHAM
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

WILLIAM G. MITCHELL,

Plaintiff,

vs.

PEPSI-COLA GENERAL BOTTLERS, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, a/k/a/ AUTOMOBILE MECHANICS UNION #701,

Defendants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Honorable
John P. Grady
District Court Judge

NOTICE OF FILING

TO:	Seyfarth, Shaw, etc	William A. Widmer, Esq.
	55 East Monroe Street	39 South LaSalle Street
	Suite 4200	Suite 1110
	Chicago, Illinois 60603	Chicago, Illinois 60603

PLEASE TAKE NOTICE that the undersigned on July 25, 1984, has filed with the United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff's Reply Memo to Defendant's Memorandum in Opposition to Plaintiff's Motion to Remand, a copy of which is attached hereto and hereby served upon you.

/s/ JULIUS PADEGIMAS
Attorney for Plaintiff

JULIUS PADEGIMAS
100 West Monroe
Suite 1200
Chicago, Illinois 60603
Phone: (312) 726-0756

RECEIVED
Jul 25, 1984
H. STUART CUNNINGHAM
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM G. MITCHELL,
Plaintiff,
vs.
PEPSI-COLA GENERAL BOTTLERS, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, a/k/a AUTOMOBILE MECHANICS UNION #701,
Defendants.

Case No. 84 C 5054

Judge Grady

PLAINTIFF'S REPLY MEMO TO DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

PROCEDURAL BACKGROUND

The posture of the case that was initially filed in the Circuit Court of Cook County and removed by the Defendant to the Federal Court is one in which the Plaintiff, under Court I of his First Amended Complaint, alleges that the Defendant engaged in a tortious course of conduct cognizable under the common law, whereby he was duressed by threats and fradulently, maliciously and intentionally deprived of his employment by the said tortious acts. This is not, as represented by the Defendants, a case of wrongful discharge in violation of a purported collective bargaining agreement, since the Plaintiff did not allege the same since he was not discharged for either a

just or an unjust cause, thereby giving rise to a dispute that arguably *might* be amenable to arbitration pursuant to the terms of that said agreement. Here in the instant case, no discharge was involved, since the Defendant herein did not terminate the Plaintiff's employment for any reason whatsoever. Consequently, since he was not discharged for any cause, there would be no dispute cognizable under the terms of the purported collective bargaining agreement. Rather, what is at issue here and what is alleged, is duress and deception on the part of the Defendant, whereby they wrongfully and maliciously and intentionally engineered the resignation of the Plaintiff by threats and intimidation, knowing full well that the perpetration of the fraud would result in the Plaintiff signing his resignation.

ARGUMENT

Despite the fact that the Plaintiff clearly alleged tortious conduct cognizable at common law against the Defendant, the Defendants insist that somehow or other he has alleged breach of a collective bargaining agreement as being the gravamen of his complaint. This is simply not so and the mere fact that the Plaintiff recites for indentification purposes that he was a member of the union and as such a beneficiary of a union agreement, does not in any way change the clear allegations that he has made in Count I of his Complaint, into an allegation of breach of a collective bargaining agreement. He has made no such allegation and none such is necessary. The Defendants, however, insist that an allegation of breach of the collective bargaining agreement has been made simply because in their words, "this would squarely present a Federal Court question under Section 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185". Apparently the Defendants feel that in any situation where there is a Defendant engaged in commerce which is not purely intrastate, the above said Labor Management Relations Act, 29 U.S.C. Sec. 185, would serve to insulate

them from whatever tortious activity they chose to comcence against any of the employees. This is simply not so and the United States Supreme Court has consistently rejected this contention that the Defendant's maintain. The Court has consistently maintained that the Federal Labor Management Relations Act has not preempted the jurisdiction of State Courts to provide a remedy for a litigant seeking relief from tortious activity conducted against him on the part of an employer or a Union. In the case of *International Association of Mechanists, et al. vs. Gonzales*, 42 L.R.R.M. 2135, the United States Supreme Court held, "if as we held in the *Laburnum* case, certain State causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts, aducible in the tort action and a plausible proceeding before the National Labor Relations Board, a State remedy for breach of contract also ought not to be displaced by such evidentuary coincidence when the possibility of conflict with Federal policy is similarily remote. The possibility of conflict from the Court's award of damages in the present case is no greater that from its order that Respondent be restored to membership. In either case the potential conflict is too contingent to remotely relate it to the public interest, expressed in the Taft-Hartley Act, to justify depriving State Courts of jurisdiction to vindicate the personal right of an ousted Union member". In that case also the Court in rejecting the argument that the jurisdiction of State Courts is pre-empted by the National Labor Relations Act, was mindful of the fact that although a tortious conduct may be an unfair labor practice, only a full and complete remedy could be secured in the State Courts without in any way interfering with the Federal scheme of regulating labor relations within the Federal ambit: "Althoug if the Union's conduct constituted an unfair labor practice the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not in such case as is here presented deprive a party

of available State remedies for all damages suffered." The United States Supreme Court again in the case of, *United Automobile Workers vs. Russell,* L.R.R.M. 2142, where a Union worker has been prevented from working by members of his Union picketing and threatening him, sustained a State Court verdict in favor of the worker and rejected the argument that State Court jurisdiction had been pre-empted by the Labor Management Relations Act. In rejecting the argument that the Federal Act had pre-empted State Court jurisdiction, in this case involving malicious interferrence with an employee's lawful occupation the United States Supreme Court said, "We uphold the jurisdiction of the State Court in his case as we did in the *Laburnum* Case", further the court said, "It is our view that Congress has not made a such a distinction and that it has not in either case deprived the victim of the kind of conduct herein involved, of Common Law rights of action for all damages suffered." Therein the Court in discussing the Act further went on to state: "This section is far from being an express grant of exclusive jurisdiction, superceding Common Law actions, by either an employer or an employee, to recover damages caused by the tortious conduct of the Union." The United States Supreme Court again, in the case of *Farmer vs. Carpenter,* 430 U.S. 292, reversed a California Appellate Court which had held that the Federal Labor Relations Act has pre-empted the jurisdiction of State Courts, in a stiuation where intentional acts of Union officials had intentionally violated a Union agreement. The Supreme Court held that the Federal Act had not pre-empted State Court jurisdiction. In so doing, the United States Supreme Court discussed the pre-emption doctrine and observed: "On the other hand, because Congress has refrained from providing specific directions with respect to the scope of pre-empted state regulations, the Court has been unwilling to declare pre-empted all local regulations that touches or concerns in any the the complex inter-relationship between employee, employers and Unions." The Court then went on to state that in situations where the State action

attempted to regulate activities that are protected by Sec. 7 of the National Labor Relations Act, or attempted to define what constitutes unfair labor practices under Sec. 8 of the said Act, the pre-emption doctrine might lie. However, the Court went on to list several exceptione as to the pre-emption doctrine where the resolution of the dispute involving tortious conduct, would not disserve the interest promoted by the Federal Labor Statutes. "We have refused to apply the pre-emption doctrine to activity that would otherwise fall within the scope of *Garmon* if that activity was merely peripheral concern of the Labor Management Relations Act, or touched interests so deeply rooted in local feeling and responsibility that in the absence of compelling Congressional direction, we could not infer that Congress had deprived the States of their power to act." The Supreme Court then listed malicious libel, mass picketing and threats of violence, wrongful expulsion from Union membership, violence or the threat of violence and defamation as examples of tortious activity in a labor area that would not pre-empt State jurisdiction. It went on to say that its rationale was best illustrated by its decision in *Linn vs. Plant Guard Workers*, 383 U.S. 53, which involved a defamation. The Court concluded that in this situation State jurisdiction would not be pre-empted because the prosecution of the Common Law action at the State level would not interfere with the effective administration of National Labor policy. The Court noted that the tortious conduct complained of was not one protected by the Act and consequently the entertainment of the cause of action in a State Court would not "result in State regulation of conduct that Congress intended to protect". Further, the Court went on to state that although the tortious conduct could have been deemed an unfair labor practice under the Act, there was no adequate provision for the assessment of damages. The Court also took note that the State has an overriding interest in protecting its residents from this type of tortious conduct. Consequently, there was no pre-emption.

Consequently, since fraud, duress, threat and deception are not activities protected by the National Labor Relations Act, and since under the Act, the relief available at Common Law in State jurisdictions is not available under the Federal Act, and since Federal Law was not created as a shield under which employers could commit fradulent, willful and deceptive acts against their employees, which would offend the sensibilities of civilized man, and since the resolution at the State level of the Common Law tort, could be determined without in any way passing upon the question of whether or not fraud and deception and duress constitute unfair labor practices, it is respectfully suggested that in light of the clear holdings of the United States Supreme Court, as indicated above, the jurisdiction of the Circuit Court of Cook County, is not pre-empted in this matter, as maintained by the Defendants.

The redress of a wrong inflicted by the defendant's brutal and naked aggression against the Plaintiff as alleged in Count I of the Amended Complaint surely cannot be construed as an impermissible State interference with the regulation of labor relations as defined in the Federal Act. Quite to the contrary, the United States Supreme Court has specifically upheld State Court jurisdiction in these matters.

Had Mr. Mitchell been discharged by a Colt 45 automatic in an argument with the Defendant, the Defendants under their argument would claim immunity from any action in the State Courts, either Civil or Criminal, maintaining as they apparently do, that all labor related disputes are within the exclusive domain of the National Labor Relations Board and Federal jurisdiction. This is not so and the Supreme Court has said so.

Respectfully,
/s/ JULIUS PADEGIMAS
Attorney for Plaintiff

JULIUS PADEGIMAS
100 West Monroe
Suite 1200
Chicago, Illinois 60603
Phone: (312) 726-0756

CERTIFICATE OF SERVICE

Julius Padegimas, attorney for the plaintiff herein, certifies that he served a copy of Plaintiff's foregoing Memo to all attorneys of record, by mailing same in a properly addressed, stamped envelope, by placing same in a U.S. Mail Chute located at 100 West Monroe, Chicago, Illinois, on this 25th day of July, 1984.

/s/ JULIUS PADEGIMAS
Julius Padegimas

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2949

WILLIAM G. MITCHELL,
Plaintiff-Appellant,

vs.

PEPSI-COLA BOTTLERS, INC. and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, a/k/a AUTOMOBILE MECHANICS UNION, #701,
Defendant-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Honorable
John P. Grady
District Court Judge

NOTICE OF FILING

TO: Seyfarth, Shaw, Fairweather
& Geraldson
55 East Monroe, Suite 4200
Chicago, Illinois 60603

PLEASE TAKE NOTICE that on September 12, 1985, the attached Petition for Rehearing with Suggestion for Rehearing in Banc, was filed with the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois, copy of which is attached and hereby served upon you.

Respectfully submitted,
/s/ JULIUS PADEGIMAS
Julius Padegimas, attorney for
Plaintiff/Appellant

JULIUS PADEGIMAS
100 West Monroe
Suite 1200
Chicago, Illinois 60603
Phone: (312) 726-0756

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

NO. 84-2949

WILLIAM G. MITCHELL,
Plaintiff-Appellant,

vs.

PEPSI-COLA BOTTLERS, INC.
and INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, a/k/a AUTOMOBILE
MECHANICS UNION, #701,
Defendant-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division
Honorable **John Grady**, Judge Presiding

APPELLANT'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

JULIUS PADEGIMAS
Attorney for Plaintiff/Appellant

JULIUS PADEGIMAS
100 West Monroe
Suite 1200
Chicago, Illinois 60603
Phone: (312) 726-0756

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Pursuant to the Federal Rules of Appellate Procedure 35(a) and 40(a), plaintiff/appellant, Billy Mitchell, petitions for rehearing upon the opinion and order of the United States Court of Appeals for the Seventh Circuit dated September 3, 1985; and suggests that due to the grave questions of exceptional importance that the opinion raises, the entire Seventh Circuit rehear the case in banc, before allowing its mandate to issue on the said opinion, since it violates the mandates of the Supreme Court of the United States, subverts the public policy of the State of Illinois, and seeks to establish for this Circuit the legal perversion of judicial protection for acts of fraud and intentional misconduct.

These allegations are not merely rhetorical in nature, but are made in the denotive sense, to express the horrendous consequences of an opinion, which from the standpoint of the impartial administration of justice, are catastrophic in nature.

Mr. Mitchell, a 55 year old man, was an employee of the defendant, Pepsi, and as a mechanic a member of the Union with which Pepsi had a collective bargaining agreement in effect, protecting its employees from discharge other than for cause.

Mr. Mitchell was never discharged by Pepsi, and this Pepsi admits. Mr. Mitchell in his complaint in State Court alleged that Pepsi, through fraud, in a scenario engineered and instigated by it, coerced him into signing his resignation through threats and intimidation. Pepsi admitted the use of force against Mr. Mitchell and the fact that he resigned, and was not discharged.

REMOVAL IMPROPER—NO FEDERAL JURISDICTION

Pepsi, when faced with potential liability in punitive and compensatory damages, as the consequences of its fraud and

willful acts, promptly sought removal to the Federal Courts on the ingenious and self serving grounds that Mr. Mitchell's allegations of fraud and willful conduct only stated a cause of action for a "constructive breach" of their collective bargaining agreement and therefore exclusively cognizable in the Federal Courts under 29 U.S.C. 185.

That Pepsi should attempt to limit its potential liability in compensatory and punitive damages for fraud and intentional misconduct is understandable—they are the defendant. But that this court should preferentially discount Mr. Mitchell's allegations, and opt to give credence to those of Pepsi is incomprehensible. In so doing the Court prejudges Mr. Mitchell's allegations of fraud and intentional misconduct, and allows them no viability as a matter of law, save as the elements in breach of contract action, and further and most incredibly allows the interposition of a private contract as a defense to fraud and intentional and willful misconduct. The proper defense to a charge of fraud is a denial. The proper defense to a charge of willful misconduct is a denial. It cannot be the assertion of a private contract, the terms of which purportedly allow one of the parties to engage in acts that are proscribed by law. Pepsi cannot plead that its private contract with the Union protects it from the public law prohibiting fraud and intentional misconduct, nor can it claim that its private contract can immunize it from the full consequences of its acts that violate the public law. Despite the fact that this is against public policy, *Kenna v. Calumet H&SCR Co.*, 206 Ill.App. 19, 284 Ill. 301, and a denial to Mr. Mitcehll of equal protection of the law, Pepsi not only claims this but has received this court's judicial sanction to do so. This Court now protects Pepsi from liability for its fraud and intentional misconduct by rendering those acts non-actionable, per se, and allows Pepsi to plead its private contract as a defense thereto. A travesty that clearly violates public policy. *Commissioners of Lake Fork Spec. Drain Dist. v. People, ex rel Bodman.* 138 Ill. 87; *Penn v. Bornman,* 102 Ill. 523; *Green v. Hutsonville Township High School District #201,* 356 Ill. 216.

Yet is is this travesty alone that is used to support the Court's assertion of Federal jurisdiction. Without this slender reed, there is nothing. The Court correctly states the rule of the well-pleaded complaint, and the artful doctrine exception thereto. It concedes that the plaintiff's complaint did not present the theory of recovery that Pepsi said it should have and for that reason, concludes that the plaintiff was artfully avoiding Federal jurisdiction. Unfortunately, the plaintiff, in his pleadings is constrained by the facts; and those facts create not a Federal question, but a common-law tort for fraud and willful misconduct. It's this Court alone that made a Federal Case out of a simple tort, by allowing Pepsi as indicated above, the unprecedented right of asserting its private contract as a defense to fraud. Because the Court finds preferentially that Pepsi's formulation of "constructive discharge" is more appealing than the plaintiff's prosaic statement of the simple facts, it finds the plaintiff artful. This accusation of art is disturbing, since the Court points out no misrepresentation, mistatement, distortion or concealment on the part of the plaintiff whereby he was artful. He is apparently artful in failing to anticipate the art of others. The simple fact is that Mr. Mitchell's honest pleadings of the facts cannot allege a Federal Question since as Pepsi concedes, the collective bargaining agreement was not breached, since no discharge occurred, and secondly because the tort of fraud and willful misconduct are not Federal Questions. Removal therefore was improper.

NO PRE-EMPTION OF MR. MITCHELL'S CLAIM

Having manufactured Federal jurisdiction through the perversion of public policy, by allowing Pepsi to interpose its private contract as a defense to fraud and willful misconduct, the Court again in violation of that policy and in direct contradiction of explicit holdings to the contrary of the Supreme Court of the United States, holds Mr. Mitchell's claim to be pre-empted from State action and non-maintainable.

Despite explicit holdings by the Supreme Court of the United States, that claims filed in State courts for intentional torts, seeking both compensatory and punitive damages, are not pre-empted by the Labor Management Relations Act 29 U.S.C. 185, this Court holds Mr. Mitchell's claim to be pre-empted, in contradiction to those holdings. Its basis for doing so is that "the plaintiff interprets too narrowly the protections. . .of the collective bargaining agreement", and because "lost wages and other damages. . .appear to be an incident of the discharge itself and not an incident of independent tortious activity by Pepsi".

These propositions are simply unbelievable distortions of the law. It is astounding that the Court predicates Mr. Mitchell's right to be free from fraud and intentional misconduct upon Pepsi's private contract, and not the public law that applies to all; it is not Pepsi's private contract that guarantees that Mr. Mitchell will not be defrauded, duressed, threatened or intimidated, but the law. Or at least it did until this opinion came down, placing Pepsi apart, and immunized by this decision from the consequences of its fraud and intentional misconduct.

Secondly, the damages that Mr. Mitchell sustained arise out of, and flow from the wrongful acts committed against him, and are an incident of those wrongful acts. The wrong complained of is fraud and intentional misconduct that are themselves actionable and compensable, in both actual and punitive damages. They are not as the Court finds damages limitable to a breach of contract action for "constructive discharge". The Court violates the public policy of this State and perverts the law by immunizing Pepsi through the special dispensation of this opinion from the full consequences of its fraudulent and oppressive conduct. *Donovan v. Consolidated Coal Co.*, 88 Ill. 589, 187 Ill. 28; *Bucher v. Krause*, 200 F.2nd. 567; *Consolidated Coal Co. of St. Louis v. Haenni*, 146 Ill. 614.

The Court in protecting Pepsi from full liability for its fraud and intentional misconduct incomprehensibly evades the

careful and sedulous opinions of the Supreme Court of the Unites States, *Construction Workers vs. Laburnum*, 347 U.S. 656; *Farmers vs. Carpenters Local #25*, 430 U.S. 292; *United Automobile Workers vs. Russell*, 42 L.R.R.M. 2142, which in formulating its exceptions to the Federal pre-emption doctrine, did so precisely to ensure private individuals the right to recover in full all damages occassioned by intentional misconduct, particularly, punitive damages. In these opinions the Supreme Court repeatedly points out that only State Forums can grant this full relief, since under the Federal scheme, authority to award these damages is absent. The Supreme Court repeatedly in these cases points out in formulating its exceptions for willful wrongs, that the Federal scheme of industrial harmony is not thwarted by State Forums granting relief for intentional wrongs.

That this Court could disregard these holdings and subvert sound public policy against fraud and intentional wrongdoing, by immunizing Pepsi is from a judicial standpoint, astounding. That this Court could preclude Mr. Mitchell's action for redress of fraud, duress and intimidation committed against him by Pepsi, because Pepsi and the Union entered into a private contract whereby "Defendant and the Union intended their collective bargaining agreement govern such disputes" constitutes a scandalous perversion of public policy and evasion of the clear mandate of the Supreme Court.

It is unfortunate that the Court in evading the clear mandate of the Supreme Court of the United States, stoops to find authority for its constructive discharge rationale in the opinion of arbitrators.

The case of *Allis Chalmers v. Lueck*, decided by the Supreme Court April 16, 1984, does not establish the defense of private contract for a fraud, it merely holds that where a plaintiff *alleges* a breach of a contract in his pleadings, that is cognizable under 29 U.S.C. 185, the nature of the breach will be determined by Federal Contract Law. Mr. Mitchell alleged

no such breach, but sought redress for actions in tort actionable per se that required no construction of contract terms. If Pepsi committed fraud it is resolvable without reference to any contract; whether they committed intentional misconduct of duress and intimidation is likewise resolvable without reference to private contract. They are actions that are proscribed by public law and actionable thereunder, and do not derive from any private contract Pepsi had with its Union; nor can Pepsi plead its contract as a defense to an action brought for violation of the public law.

CONCLUSION

For the foregoing, to forestall the public scandal of this Court's mandate issuing on an opinion that violates public policy, protects fraud, and evades the explicit mandates of the Supreme Court of the United States, and to ensure that Mr. Mitchell receive justice to which under the public law, he is entitled, it is urged that this Court refuse its mandate to this opinion, and rehear the case in Banc.

Respectfully submitted,

Julius Padegimas
100 West Monroe
Suite 1200
Chicago, Illinois 60603
Phone: (312) 726-0756

Attorney for Plaintiff/Appellant
William G. Mitchell

Dated September 11, 1985

CERTIFICATE OF SERVICE

Julius Padegimas, attorney for plaintiff/appellant, William G. Mitchell, certifies that he caused a copy of the foregoing Notice of Filing and Appellant's Petition for Rehearing With Suggestion for Rehearing in Banc, to be served by mailing same in an envelope, postage prepaid, at 100 West Monroe, Chicago, Illinois, on the 12th day of September, 1985, to:

SEYFARTH, SHAW, FAIRWEATHER
AND GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603

/s/ JULIUS PADEGIMAS
Julius Padegimas

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

WILLIAM G. MITCHELL, *Plaintiff,* vs. PEPSI-COLA GENERAL BOTTLERS, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, a/k/a AUTOMOBILE MECHANICS UNION #701, *Defendants.*	General No. 84 L 9800

NOTICE OF REMOVAL TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS FROM THE CIRCUIT COURT OF COOK COUNTY

To the Judges of the Circuit Court of
Cook County, Illinois:

Pursuant to 28 U.S.C. § 1446(e), attached hereto is the Petition and Notice of Removal of Defendants Pepsi-Cola General Bottlers, Inc. and International Association of Machinists and Aerospace Workers Local 701 filed on the 14th day of June, 1984, in the United States District Court for the Northern District of Illinois, Eastern Division, Chicago, Illinois. Pursuant to 28 U.S.C. § 1446(e), this Court may not proceed further with this matter.

Respectfully submitted,

PEPSI-COLA GENERAL BOTTLERS, INC.

By /s/ JOHN L. COLLINS
One of Its Attorneys

William R. Sullivan, Jr., Esq. (I.d. 51491)
John L. Collins, Esq. (I.d. 51748)
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON (I.d. 90747)
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000
Attorneys for Pepsi-Cola
General Bottlers, Inc.

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, Local 701
By /s/ WILLIAM A. WIDMER III
One of Its Attorneys

William A. Widmer, Esq.
CARMELL, CHARONE & WIDMER, LTD.
39 South LaSalle Street
Suite 1110
Chicago, Illinois 60603
(312) 236-8033
Attorneys for International
Association of Machinists
and Aerospace Workers, Local 701

CERTIFICATE OF SERVICE

John L. Collins, an attorney for Petitioner/Defendant Pepsi-Cola General Bottlers, Inc., certifies that he caused a copy of the foregoing Notice of Removal to the United States District Court for the Northern District of Illinois from the Circuit Court of Cook County to be served by messenger, hand delivered, to the following address this 14th day of June, 1984 before the hour of 4:30 p.m.:

Julius Padegimas
100 West Monroe Street
Suite 1200
Chicago, Illinois 60603

/s/ JOHN L. COLLINS
John L. Collins

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM G. MITCHELL, *Plaintiff,*	
vs.	Case No.
PEPSI-COLA GENERAL BOTTLERS, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, a/k/a AUTOMOBILE MECHANICS UNION #701, *Defendants.*	

DEFENDANTS/PETITIONERS' JOINT PETITION FOR REMOVAL

To the Judges of the United States District Court for the Northern District of Illinois:

1. A civil action has been commenced and is now pending in the Circuit Court of Cook County, Illinois, County Department, Law Division, wherein William G. Mitchell is the Plaintiff and Petitioners Pepsi-Cola General Bottlers, Inc. (hereinafter "the Company"), and International Association of Machinists and Aerospace Workers Local 701 (hereinafter "the Union") are the Defendants, which action has been designated 84 L 9800 by the Clerk of the aforementioned court.

2. Process in action 84 L 9800 was served on the Company on May 18, 1984, including a copy of the Complaint. An Amended Complaint was served on the Company on May 23, 1984. The Amended Complaint in action 84 L 9800 was served on the Union on or about May 25, 1984.

3. At all relevant times Respondent/Plaintiff was a member of the Union, a labor organization in an industry

affecting commerce within the meaning of the Labor-Management Relations Act of 1947, 29 U.S.C. § 141-87.

4. The Company is an employer in an industry affecting commerce within the meaning of the Labor-Management Relations Act of 1947, 29 U.S.C. § 141-87.

5. Action No. 84 L 9800 is a civil action over which the United States District Courts have original jurisdiction, in that the action, in part, is brought under Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, whereunder Plaintiff claims that the Company denied him certain rights under the collective bargaining agreement between the Company and the Union, and the Union breached its duty of fair representation by conspiring with the Company to deny Plaintiff said rights. *Vaca v. Sipes,* 386 U.S. 171 (1967); *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957).

6. Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, provides federal jurisdiction over this action without regard to the amount in controversy and without regard to the citizenship of the parties. *Avco Corp. v. Lodge No. 735, IAM,* 390 U.S. 557 (1968).

7. Petitioners seek removal of Action No. 84 L 9800 to this court under 28 U.S.C. § 1441(c) upon the ground that there is in the Amended Complaint a separate and independent claim or cause of action which would be removable if sued upon alone, which is joined with another nonremovable claim or cause of action. Said removable claim or cause of action is brought by Plaintiff/Respondent under 29 U.S.C. § 185 to recover, *inter alia*, damages from the Company for an alleged breach of a collective bargaining agreement. A second separate and independent claim or cause of action is brought by Plaintiff/Respondent under 29 U.S.C. § 185 to recover damages from the Union for an alleged breach of its duty of fair representation.

8. Petitioners file herewith a Bond with good and sufficient surety conditioned, as provided by 28 U.S.C. § 1446(d), that they will pay all costs and disbursements incurred by reason of the removal proceedings hereby brought should it be determined that this action is not removable or is improperly removed.

9. A copy of all process, pleadings and orders served upon Petitioners in Action No. 84 L 9800 is filed herewith.

WHEREFORE, for the above reasons, Petitioner/Defendant Pepsi-Cola General Bottlers, Inc. and Petitioner/Defendant International Association of Machinists and Aerospace Workers Local 701 pray that the above-described action pending against them in the Circuit Court of Cook County be removed therefrom to this Court.

Dated: June 14, 1984

Respectfully submitted,

PEPSI-COLA GENERAL
BOTTLERS, INC.

By /s/ JOHN L. COLLINS
One of Its Attorneys

William R. Sullivan, Jr., Esq.
John L. Collins, Esq.
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000
Attorneys for Pepsi-Cola
General Bottlers, Inc.

INTERNATIONAL ASSOCIATION
OF MACHINISTS AND
AEROSPACE WORKERS,
Local 701

By /s/ WILLIAM A. WIDMER, III
One of Its Attorneys

William A. Widmer, Esq.
CARMELL, CHARONE & WIDMER, LTD.
39 South LaSalle Street
Suite 1110
Chicago, Illinois 60603
(312) 236-8033
Attorneys for International
Association of Machinists
and Aerospace Workers, Local 701

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

VERIFICATION

JOHN L. COLLINS, being first duly sworn, deposes and says that he is one of the attorneys for Petitioner/Defendant Pepsi-Cola General Bottlers, Inc., in the above-entitled cause, that he has read the foregoing Petition, and that he believes it to be true.

/s/ JOHN L. COLLINS
John L. Collins

Subscribed and sworn to
before me this 14th day
of June, 1984

/s/ FRANK HEARD
Notary Public

My Commission expires 8/24/85.

CERTIFICATE OF SERVICE

John L. Collins, an attorney for Petitioner/Defendant Pepsi-Cola General Bottlers, Inc., certifies that he caused a copy of the foregoing Defendants/Petitoners' Joint Petition for Removal to be served by messenger, hand delivered to the following address this 14th day of June, 1984 before the hour of 4:30 p.m.:

Julius Padegimas
100 West Monroe Street
Suite 1200
Chicago, Illinois 60603

/s/ JOHN L. COLLINS
John L. Collins

CH. 110, Sec. 2-611, Ill. Rev. Stat. Untrue statements.

Allegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal.

The State of Illinois or any agency thereof shall be subject to the provisions of this Section in the same manner as any other party.

Where the litigation involves review of a determination of an administrative agency, the court shall include in its award for expenses an amount to compensate a party for costs actually incurred by that party in contesting on the administrative level all allegation or denial made by the State without reasonable cause and found to be untrue.

29 U.S.C. 185(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.